IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

STATEMENT.

This suit seeks to have declared unconstitutional an act of Congress known as "The Future Trading Act," which became a law August 24, 1921.

For this purpose appellants, who are members of the Chicago Board of Trade, filed in the District Court in their own behalf and that of all of its other members, a bill in equity against the Secretary of Agriculture, the Commissioner of Internal Revenue, the United States District Attorney and Collector of Internal Revenue at Chicago (the officials charged with the enforcement of the

Act) and also against this Board of Trade and its directors.

The prayer of the bill is that these officials may be enjoined from enforcing as against said Board, and the Board and its directors may be enjoined from complying with, the provisions of this Act.

Upon motions therefor the District Court entered a final decree of dismissal for want of equity and this appeal was perfected directly to this court.

The Act is entitled, "An Act Taxing Contracts for the Sale of Grain for Future Delivery, and Options for such Contracts, and Providing for the Regulation of Boards of Trade and For Other Purposes," but the Act provides that it shall be known by the short title of "The Future Trading Act."

A copy of the Act is set out in the appendix to this brief. Its material provisions may here be summarized as follows:

It imposes a tax of 20c per bushel upon each bushel of grain involved in

(1) unilateral contracts commonly known as "puts" and "calls";

(2) contracts of sale of grain for future delivery, EXCEPT

> (a) Where the seller is at the time of the sale the owner of the grain, or a grower thereof, or the owner or renter of the land on which the grain was, or is to be grown, or an association of such owners, growers, or renters; or
>
> (b) Where such contract of sale is made *by or through* a member of a board of trade, which has been designated by the Secretary of Agriculture as a "contract market" and such contract is evidenced by a memorandum in writing giving in detail the terms thereof; and it is also provided that such board member shall keep such memorandum for three

years, or longer, if the Secretary of Agriculture so directs, and that such memoranda shall be open to the inspection of any representative of the Department of Agriculture or the Department of Justice.

Before the Secretary of Agriculture may designate a board of trade as a "contract market."

(a) It must be located at a terminal market upon which cash grain is sold in sufficient volumes, etc., to reflect the general value of the grain and which has recognized official weighing and inspection service.

(b) Its governing board must provide for the making and filing by the board, or members thereof, as the Secretary of Agriculture may direct, such *reports* as may be prescribed by him showing the details of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery, and such board must also provide, by such rules as the Secretary of Agriculture may direct, for the keeping by it, or its members, of *records* in permanent form showing the details and terms of all such transactions, the parties thereto, any assignments or transfers thereof, and the manner in which the same have been fulfilled, discharged or terminated. Such records must be kept for three years, or a longer period if the Secretary of Agriculture shall so direct, and must at all times be open to the inspection of any representative of the Department of Agriculture or the Department of Justice.

(c) It must prevent the dissemination by it, or its members, of any false or misleading report concerning crop or market conditions.

(d) It must provide for the prevention of the manipulation of prices and cornering of any grain.

(e) It must admit to membership "any duly authorized representative of any lawfully formed and conducted co-

operative association of producers having adequate financial responsibility; *provided,* that no rule of a contract market against rebating commissions shall apply to the distribution of earnings among the bona fide members of any such cooperative association."

(f) It must provide for making effective the orders and decisions of the Secretary of Agriculture.

No board of trade may be designated as a "contract market" until it shall comply with the above conditions and give a sufficient assurance that it will continue to do so.

A Commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, is authorized to revoke the designation of any board as a "contract market" upon its failure to comply with the above requirements, or to enforce its rules of government which are made a condition of its designation as a "contract market."

The Secretary of Agriculture, upon notice to, and complaint against, any person violating the provisions of the Act, is authorized to order all "contract markets" to refuse trading privileges thereon to such person, and, as above stated, the board of trade is required by the Act to make such order effective—which it can only do, in the case of a member, by suspending or expelling him, and in the case of a non-member by requiring under penalty of suspension or expulsion all its members to refuse to accept orders from such proscribed non-member.

The Secretary of Agriculture is also authorized to make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade and to publish the result of such investigation.

Any person who shall fail to evidence his contracts for future delivery by the required memoranda in writing, or

to keep the records, or make the reports required, or who shall fail to pay the tax, is guilty of a misdemeanor, punishable by a fine of not more than $10,000 or imprisonment for not more than one year, or both.

As the bill was dismissed as upon demurrer, its allegations present the facts, which are as follows (Rec., 2-14):

The Chicago Board of Trade is a corporation created by a special charter granted to it by the State of Illinois in 1859 (Rec., 16-18), with power (1) to admit such persons as members, and expel such persons, *as it shall see fit*, (2) to maintain such rules and by-laws as it may think proper for the government of the corporation and for the management of the business of its members and the mode in which it shall be transacted, (3) to appoint committees of arbitration for the settlement of differences submitted by members or others, and the award in any such arbitration, when filed in the Circuit Court, is given the effect of a judgment, upon which execution may issue, (4) to appoint such persons as it may see fit to examine, measure, weigh, gauge, or inspect flour and grain, and the certificate of such appointees as to the quantity or quality, etc., shall be evidence between the buyer and seller assenting to the employment of such appointee.

Pursuant to its charter this Board has adopted and maintained for many years regulations respecting the inspection, sampling and weighing of grain, etc.

Its rules (Rec., 3-5), also vest the government of the Board in its board of directors, authorize such directors to determine what persons are of sufficiently good character and credit to be admitted to membership, and provide that each such applicant shall pay an initiation fee of $25,000 or present an unimpaired membership to be

transferred, and shall sign an agreement to abide by the rules and by-laws of the association.

Such rules also provide for the suspension of any member defaulting on a business contract or in the payment of an award, and also provide that for certain other offenses he shall be suspended or expelled.

The Board has never admitted to membership any corporation; but its rules provide that, if any two members of the Board are executive officers and bona fide and substantial stockholders of any corporation, it may become a party to trades or contracts on the exchange; but in that event these two members may be disciplined for any default on its contracts as fully as upon any business obligation of their own.

The Board has always levied annually an assessment upon its members sufficient in the aggregate to more than meet all its expenses, and with this surplus it has acquired real estate in the business district of Chicago, upon which it has constructed a large building, containing its trading hall and offices and also surplus space, from which it derives a substantial revenue. The fair market value of this property is $2,000,000 over and above a mortgage thereon, and the yearly assessments of its members now aggregate $240,000.

The Board itself transacts no business and pays no dividends. Its chief function is to provide an exchange room, where its members may meet daily between certain market hours, and make with each other contracts for the purchase of grain and other products of the farm. It also prescribes and enforces rules respecting its members' contracts, and enforces by disciplinary proceedings, when necessary, compliance by its members with their contracts; it also maintains and enforces rules for the settlement of disputes arising between its mem-

bers out of their contracts and displays in its exchange hall all available statistical and other news concerning crops, etc.; and about its only other function is to determine who are fit persons, as respects character and financial responsibility, to be and remain its members.

The Board's main source of revenue is the annual dues paid by its members; and it is incumbent upon the Board to make it profitable for persons to become and remain members and to pay such yearly assessments; and, in order to render its disciplinary power over its members sufficiently effective to maintain a high character for business probity among its members, it is also necessary for this Board, not only to make it profitable for members to remain such, but also to give a substantial value to its memberships. This the Board does by

(1) Restricting the number of its members;
(2) Providing that only members may make transactions in its exchange room;
(3) Prescribing, and compelling all its members to conform to, certain fixed reasonable minimum rates of commissions which its members, when acting as agents, must charge their principals for making transactions on its exchange.

For this purpose the Board has for many years maintained (as do all commercial exchanges) a rule known as the "commission rule," which prescribes the minimum rates of commission.

An essential feature of this rule is a provision (Rec., 5) for the expulsion of any member who violates the rule or evades it indirectly by giving *rebates* to customers, etc.

Before this feature of the rule was added in 1900, memberships were selling at $800 each, and since such amendment and its strict enforcement memberships have sold as high as $11,000, and are now worth about $7,000.

In recent years there have been organized in most of the grain-producing states many so-called farmers' co-operative associations, with the avowed purpose of enabling farmers, who become members thereof, to market their crop at actual cost and without paying any commissions to members of the exchanges. To attain this their plan is to have a salaried officer of the cooperative organization elected a member of the exchange, and through him to sell all the grain of members of this organization —he temporarily charging the prescribed commissions and ultimately rebating back to such members the aggregate of such commissions (after paying his salary and incidental expenses) on the basis of the number of bushels of grain each farmer shall have sold through the organization—such rebates being commonly called "patronage dividends."

There has recently been organized a corporation known as "U. S. Grain Growers, Inc.," membership in which is limited to producers of grain. This corporation is seeking to unite all farmers' cooperative organizations and elevator companies into one great movement—of which this "U. S. Grain Growers, Inc.," will be the controlling element—for the purpose of selling the grain of its members at actual cost and without the payment of any commissions to members of any grain exchange. (Rec., 5, 7, 22.)

In the past members of these cooperative associations have sought to become members of this Board; but they have been refused admission because their avowed purpose was to violate the commission rule of the Board which would destroy the business of those of its members who receive grain on consignment for sale, and the buyers that the ultimate effect of this would be to much impair, if not destroy, the value of all memberships, and make it difficult for the Board to retain sufficient mem

bers to pay assessments necessary to maintain the exchange.

Members of the Board engage only in the following kinds of trading in grain:

1. Some members receive from producers or country grain dealers grain to sell on commission and pay to their principals the proceeds less their commissions; and members also, either as agents or principals, buy and sell grain for immediate delivery in Chicago. Such transactions are known as "cash" transactions, and by the terms of The Future Trading Act they are excluded from its provisions.

2. Many members of the Board send letters or telegrams at the end of each day to country points offering to purchase grain. When accepted these become contracts for the purchase of grain upon the condition that the grain is "to arrive" in Chicago within a certain time. (This kind of trading was involved in *Chicago Board of Trade* v. *United States*, 246 U. S. 231.) Other members in like manner make contracts for the *sale* of grain to be shipped from Chicago to milling or exporting points within a certain time. While, strictly speaking, all these contracts are contracts for future delivery, they are expressly excluded from the provisions of the Future Trading Act by being denominated therein as "cash sales for deferred shipment or delivery." Moreover, contracts of these two kinds are not strictly exchange transactions; that is, the offers are generally sent out from, and the acceptances are generally received at, the offices of members of the exchange. The contracts do not result from or in any trading on the exchange itself.

3. Another kind of trading consists in the making of unilateral contracts, known as "puts" and "calls." A "call" is a contract in which one person pays to another a

small sum ($5.00 for every thousand bushels of grain involved) for the privilege of calling on the latter to deliver to the former at a future date a specified quantity of grain at a named price; and a "put" is a contract in which one acquires the privilege of delivering to another a certain quantity of grain within a certain time at a named price. When the course of the market makes it profitable for the paying member to exercise his option, he does so by making with the other member a bi-lateral contract for future delivery (such as is hereinafter more fully described) for the quantity and at the price named in the optional contract, or he delivers or receives in performance of the optional contract a warehouse receipt—issued by a grain-mixing elevator, which has been made regular by the Board. Upon contracts of this character, this Act imposes a prohibitive tax of 20c a bushel.

4. Many members daily engage, either as principals or agents, in the making in the exchange room of the Board of contracts with other members for the purchase and sale of grain for delivery during a certain named future month. Such contracts relate almost wholly to wheat, corn and oats, and the volume of trading in these commodities is so large that the Board has set aside in its exchange room for such trading three separate spaces, commonly known as "pits," where many of its members daily gather and by open *viva voce* bidding make these contracts for future delivery. The rules of the Board require that all orders received by members to buy or sell for future delivery shall be executed in the open market in the exchange room during the prescribed market hours (9:30 a. m. to 1:15 p. m.). In all such contracts the buyers and sellers are personally present in Chicago, and any offer to buy or sell for future delivery by a member in the exchange room during market hours becomes a contract with the member who first accepts the offer.

The bill sets out in detail the characteristics of such contracts. The only grain that can be delivered, or is contemplated to be delivered, on these contracts is grain that has already lost whatever interstate character it may have possessed. (This is more fully explained on pages 34 to 38 of this brief.)

For twenty years preceding the late war the price of wheat in Chicago has been generally below $1.00 per bushel, the price of corn generally below 60c a bushel, and the price of oats generally under 40c a bushel. The tax of 20c a bushel imposed by The Future Trading Act is, therefore, a prohibitive tax.

Appellants requested the board of directors of the Board to institute a suit to have this Future Trading Act declared unconstitutional, but that request was refused, and the bill alleges that these directors intend to comply with the act because they fear to antagonize the public officials, whose duty it will be to construe and enforce it. (Rec., 14.)

Errors Relied Upon.

That the District Court erred:

1. In not holding that the provision of the Act (Sec. 5 (e)), which requires the Board to admit to membership representatives of farmers' co-operative associations and to permit "patronage dividends," violates the Federal Constitution in that it deprives the Board, as well as its individual members, of their property without due process of law.

2. In not holding that those sections of the Act, which regulate boards of trade and their members and their actions and transactions and require memoranda, reports and records thereof (being Sec. 5 (b) (c) (d) (e) (f), Sec. 6, Sec. 9, and Sec. 10), violate the Constitution of the

United States in that thereby Congress attempts to regulate commerce which is wholly intrastate in character.

3. In not holding that part of the Act, which imposes a tax upon "puts" and "calls" (Sec. 3) and upon contracts for sales of future delivery when not made by or through a member of a board of trade which has become a contract market, or by a grower of grain, etc., (Sec. 4), violates the Constitution of the United States in that it is not within the power conferred on Congress to levy taxes.

4. In entering the decree dismissing the bill instead of a decree granting the relief prayed by the bill and adjudging said Future Trading Act unconstitutional in the particulars above stated and *in toto*.

ARGUMENT.

Point I.

THE POWER TO IMPRESS PRIVATE PROPERTY WITH A PUBLIC USE.

All private property is held subject to the proper exercise of this power, and any statute, which is the exercise of this power, does not violate the Constitution by depriving the owner of his property without due process of law.

Munn v. *People*, 94 U. S. 113.

The question here is whether Sec. 5 (e) of The Future Trading Act can be sustained as a proper exercise of this power. This calls for a consideration of the origin and scope of this power.

The early common law divided business occupations and the properties used therein into two classes. One included those which were strictly private. In these the common law permitted the owners to sell, or refuse to sell, their property and their services in connection therewith as they pleased, and to charge therefor any price they saw fit. They could serve, or allow the use of their property to, one person, and refuse a like privilege to another for no reason whatsoever.

The other class comprised those occupations, in which owners had so used their property that the public acquired an interest therein to such an extent that such owners were not permitted either to discriminate between those desiring to share in the service rendered, or to make an unreasonable charge for such service. The common law placed on such owners the duty to serve all alike and at reasonable rates.

In this class were the local miller, the inn-keeper, the carrier (in that age a stage-owner), the owner of a wharf on a navigable water (wharfinger), etc.

As travel and transportation developed, it gave rise to railroads and other modern common carriers; but these were obliged to seek and obtain from the state special privileges, such as the right of eminent domain, and thereby they submitted themselves to a larger measure of governmental control than exists as respects the class now under consideration. Having once devoted their property to use as a railroad, these are not permitted to withdraw it from that public use. But even as respects this class the power to legislate has been confined to statutes which benefit the public at large.

(See *Mo. Pac. Rwy.* v. *Nebraska*, 164 U. S. 403, and other cases cited on pp. 20, 21 of this brief.)

It has never been held, even as respects these modern common carriers, that any person could be legislated into a position where he might share with the owners the profits accruing from the use of their property in public service.

Returning now to the second of the classes above named—as business life became more complex and the instrumentalities used therein became more enlarged and complicated, it became necessary that there should rest somewhere the power to impress other properties and their owners with a public use and thereby impose on them this duty of serving all alike and at reasonable rates.

The courts of the country are now agreed that this power is legislative and not judicial in character.

Express cases, 117 U. S. 29.

The American Live Stock Co. v. *Live Stock Exchange*, 143 Ill. 210.

Ladd v. *S. C. P. & M. Co.*, 53 Texas 174.

The legislatures of the states were the first to exercise this power. Apparently the first of these statutes passed the Illinois Legislature in 1871. It undertook to fix the maximum rates of storage for the grain-mixing elevators of Chicago. That statute was attacked in this court—

Munn v. *Illinois*, 94 U. S. 113,

upon the ground that it violated the due process of law clause in the 14th Amendment of the Constitution, but this court upheld the statute as a proper exercise of the power to impress property with public use, or to regulate property, whose use by the owner had already impressed it with a public use.

Similar statutes were subsequently passed in New York and North Dakota, and these were sustained by this court on the same principle.

Budd v. *New York*, 143 U. S. 517.
Brass v. *North Dakota*, 153 U. S. 391.

Subsequently this court sustained as a proper exercise of this power a Kansas statute—which required insurance companies to charge reasonable rates—and amplified the doctrine by making the business, rather than the property used therein, the object to be impressed with a public use.

German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389.

All these statutes were alike in that the benefits they conferred accrued to the public generally and not to a mere class of the public, and their purpose was only to impose the rule requiring that all should be served alike and at reasonable rates.

None of them required the owners of the property or business to do more than permit all to share in the service rendered without discrimination and at reasonable rates. The foregoing is also true of the state statutes

involved in the numerous state decisions reviewed by this court in *Budd* v. *People, supra.*

Neither the inn-keeper, stage-owner, wharfinger, etc., under the common law, nor the grain elevator owner or insurance company under these statutes, was required to admit others to share in the ownership of the business or the instrumentality rendering the service or in the profit accruing to the owners therefrom. Thus in

Munn v. *Illinois*, 94 U. S. 133,

this court said:

> "There is no attempt to compel these owners to grant to the public an interest in their property, but to declare their obligations, if they use it in this particular manner."

The foregoing decisions of this court also make it clear that the power to impress property with a public use is, as respects a state, "an exercise of the police power of the state," (*Budd* v. *New York*, 143 U. S. p. 545). And in

Lawton v. *Steele*, 152 U. S. 133-137,

when discussing the nature and extent of the police power, as exercised by a state statute providing for the destruction of fishing nets, this court said:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference."

It thus appears clear that in a proper case a state, in the exercise of its police power, may by statute impress property with a public use.

But the general police power resides only with the states. Congress may exercise such power only so far

as it is included in the other powers conferred on it by the Constitution.

Hamilton v. *Kentucky Distilleries*, 251 U. S. 146.
United States v. *Cruikshank*, 92 U. S. 542.
Tennessee v. *Davis*, 100 U. S. 257, 302.

If Congress has also this power to impress property with a public use, it must reside in its commerce power. But is that power broad enough for this? It is merely the power to "regulate" commerce.

Again, this power as respects any particular object must reside exclusively either in the state or in Congress; it cannot well reside in both without producing conflicting statutes.

Where the property is wholly within a state and the business, in which it is used, is mainly intrastate, the power to impress them with the public use ought, it would seem, to belong exclusively to the state.

If so, the Future Trading Act is not the exercise of the power to impress the Board of Trade and its property with a public use; for the Board transacts no business, its property is in Illinois, it is used by the Board only to provide a meeting place for traders, offices for its own use, and space to sub-let to others; practically all who make trades in its exchange room are residents within that state; all the trading for future delivery—which constitutes the major part of the trading in the exchange room—is intrastate commerce, as is pointed out on pages 34-43 of this brief; the selling on commission by members in the exchange room of grain consigned to them by the owners is, as respects the service they render, not interstate commerce; (*Hopkins* v. *United States*, 171 U. S. 587); the buying of grain by members on a commission basis is of the same character; much of the buying and selling for immediate delivery upon the exchange is

necessarily between principals, who reside in Illinois, and relate to grain, which has never been out of Illinois; while most of the buying and selling of grain by members of the exchange for deferred shipments to or from Chicago is not made in the exchange room but by letters or telegrams between the offices of such members and the other parties to the purchases or sales.

In short, the property of the Board is situate in Illinois, the Board itself transacts no business upon its property, and the business that the Board permits its members to transact thereon is mostly of a domestic and local, as distinguished from an interstate, character; and it would seem that the power to impress this property and business with a public use ought to belong to the State of Illinois alone.

The further discussion, or the decision, of this question, may perhaps be unnecessary because, assuming that this power is a part of the commerce power of Congress, this provision of the Future Trading Act, which forces representatives of farmers co-operative associations into membership in the exchanges, is in no sense a proper exercise of the power.

It is not for the benefit of the public generally but only of a certain class—farmers' organizations. Associations of millers, exporters, etc., are not given the right to force their members into the exchanges.

This exchange, its rules and by-laws, its exchange room and its members, should be considered jointly as constituting a local instrumentality of trade capable of rendering a service in the purchase and sale of grain, for which others are willing to pay. It is therefore not to be distinguished in character from privately owned grain-elevators, inns, stage-coaches, etc. In all cases the property involved is privately owned, and the only interest therein

that a statute may grant to the public (without paying for the property) is an interest in the use of the property, or, in other words, the right of all to share in the service it renders on fair and common terms.

But The Future Trading Act does not undertake to compel the one thing that the common law and these statutes authorize. Its purpose is not to get for all producers of grain the right to have their grain sold on the exchange. They already have that. Nor is its purpose to better the service, which the exchanges render, or to effect a change in the present rates of commission, which non-members must pay to their agents on the exchange for the sale or purchase of grain there.

There is no claim that the rates now charged are not as low as they can be, nor that the service furnished by these instrumentalities is not efficient.

What the Future Trading Act does is to force agents of farmers' organizations into membership in the exchanges, so that all farmers, who join co-operative associations, may escape the payment of the commissions—which all others must pay—and thereby share in the profit which accrues from the rendering of the service—a profit which has resulted to the members of the exchanges from the creation and maintenance for many years, (at private expense of money and effort) of these instrumentalities of trade.

This instrumentality or privately owned property—and the profit accruing from its use—like the grain elevator or insurance company, and the profit therefrom belong to those who have created and own it, and nothing short of the exercise of eminent domain can impair or deprive such owners of that property or of their profit from its use.

Thus the power to impress property with a public use should not protect Section 5 (e) of this Act from the

application to it of the due process clause of the 5th Amendment.

II.

THE PROVISION OF THE ACT (SEC. 5 (E)) REQUIRING THE EXCHANGE TO ADMIT TO MEMBERSHIP ANY DULY AUTHORIZED REPRESENTATIVE OF A CO-OPERATIVE ASSOCIATION OF PRODUCERS, AND SANCTIONING "PATRONAGE DIVIDENDS," DEPRIVES THE BOARD OF TRADE AND ITS MEMBERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Any statute which takes private property for a private purpose—as well as one which takes property for a public use without the payment of adequate consideration,—violates the due process clause of the 5th and 14th amendments to the Constitution.

Mo. Pacific Rwy. Co. v. *Nebraska*, 164 U. S. 403.
Missouri Ry. v. *Nebraska*, 217 U. S. 196.
Chi., M. & S. P. R. R. v. *Wisconsin*, 238 U. S. 491.
Eubank v. *Richmond*, 226 U. S. 137.
Cole v. *La Grange*, 113 U. S. 1.

The first of these cases has many points of similarity to the case at bar. Farmers of a certain county in Nebraska (Farmers' Alliance No. 365) had associated themselves together for the same purpose as sought by Sec. 5 of The Future Trading Act—to market their crops at cost—by constructing and operating a local elevator for their joint benefit. The statute of Nebraska prohibited railroads from giving any preference or advantage to, or subjecting to any prejudice or disadvantage, any person or locality, or any particular description of traffic *in any respect whatever.*

The railroad company had already leased to two private persons sites upon its rights of way for the construction of local elevators at that point, and this as-

sociation of farmers claimed that the refusal of the railroad company to permit them also to construct an elevator on its right of way violated the foregoing statute, and the State Supreme Court so held. But this court held that "was in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners," and that this was not due process of law.

The 5th amendment applies to an intangible right as well as to tangible property.

> *Monongahela Co.* v. *United States*, 148 U. S. 312, 343.
>
> *Oklahoma* v. *Kansas Nat. Gas. Co.*, 221 U. S. 229, 253.

Again, any statute which materially impairs the value or profitable use of private property is as much a taking within the due-process-of-law provision as the actual appropriation of it.

> *Peabody* v. *U. S.*, 231 U. S. 530.
>
> *Filor* v. *U. S.*, 9 Wall. 45, 49.

Indeed, a pecuniary loss need not be shown. If the right of property is invaded, the statute is within the constitutional provision.

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."
>
> *Buchanan* v. *Warley*, 245 U. S. 60, 74.

A statute, therefore, which, like the one at bar, compels an unwilling owner to admit others into a right to enter upon and use his property, violates the due-process-of-law provision, unless there is a taking for public use—in which case compensation must be made.

To apply these principles to the case at bar: This Board was by special charter created by the State of Illinois a *private* corporation with power to acquire and hold property. Originally this right was limited to $200,000 worth of property. By subseqent statute this limitation was removed. For more than sixty years the members of this Board have annually paid assessments or dues sufficient to meet the current expenses and create a large surplus, which is now represented by an exchange building in Chicago of the value (above a mortgage) of more than $2,000,000. This property is just as much privately owned as is any office building or private residence.

It is as much a violation of the due-process clause for Congress to give outsiders entrance into this building as would be a statute compelling owners of residences to admit roomers into their homes.

This Board, acting under a power expressly given it by its charter, has for sixty years confined access to and use of, a part of this property—its exchange hall—to such persons, as in the exercise of their discretion its board of directors should deem to be fit persons to there make contracts with other members. *Indeed, the basic right inuring from membership in this association is the right to enter this exchange hall and there trade.*

Many efforts have been made to get the Illinois courts to interfere with, and control, the exercise of this discretion and determine who should be its members, but always without success.

Board of Trade v. *Nelson*, 162 Ill. 431, 438.
People v. *Board of Trade*, 80 Ill. 134.

In one case involving a similar exchange (*American Live Stock Co.* v. *Live Stock Exchange*, 143 Ill. 210), the Illinois Supreme Court expressly held that the courts

were without power to compel the exchange to accept any person as a member.

The reason for this attitude of the courts is well expressed in

McCarthy Bros. v. *Minneapolis Chamber of Commerce*, 105 Minn. 497,

as follows:

> "The reasons why the rule and regulations with reference to the acquisition of membership must be given full force and effect lie on the surface. The business transacted by such organizations and the methods pursued are unusual and special. The members do not deal at arms' length to the same extent as under ordinary circumstances. An unusual degree of confidence is imposed by each member in his fellow members, not because human nature is more trustful and confiding in the Chamber of Commerce than elsewhere in the marts of trade, but because the business is transacted under unusual self-imposed restrictions and with extraordinary provisions for enforcing verbal agreements and understandings which possibly may not be enforceable in the courts."

This Board has also thought it advisable (Rec., 4) not to permit any corporation to become a member; but it allows a corporation to make trades upon its exchange, if *two* of its executive officers and substantial stockholders are members, and it makes these two members subject to discipline for failure of their corporation to comply with its business obligations.

By The Future Trading Act farmers' associations may participate in the trading by having *one* representative admitted to membership.

Sec. 5 (e) compels this Board to admit to its exchange room—and the privilege of trading there with other members—*any* duly authorized representative of a co-operative farmers' association (which, of course, means that *all* such representatives must be admitted), provided only

that the association—not the representative—has adequate financial responsibility. The representative need not be a fit person, if his association has sufficient financial responsibility.

Thus, the right which every exchange has—and must have in order to function properly—to admit into its exchange room and trading privileges only such persons as, in the judgment of its officials, are in point of character, business integrity and financial standing, fit persons to join in the trading, is, by this act, destroyed in favor of a certain class—farmers' organizations and their representatives.

The proper exercise of this discretion by the directors is of great importance to all trading members, because the first member to accept a bid in the "pits" gets the trade, and trades for very large amounts are made oftentimes in an excited and noisy market by mere word of mouth, and no opportunity is afforded to ascertain, before the making of the trade, the present financial responsibility of the trader. The rules requiring margins often afford inadequate protection when the markets are excited and the fluctuations are sudden and large.

Thus, the principal protection to traders is the character of the trader and the assurance—which the character of the trader only can give—that he will not go beyond his financial depth.

This act deprives the exchange and its members of the present right to have its directors determine whether any applicant has the requisite character and financial responsibility. As respects farmers' associations, the Secretary of Agriculture is made the final judge of this. If the exchange should refuse to admit a representative of a farmers' association, which he—disagreeing with the directors—thinks has sufficient financial responsibility, he may direct the admission of the applicant, and if this

is refused, he may deprive the exchange of its designation as a "contract market."

Thus this exchange is, by this Future Trading Act, expressly deprived of its present charter right to say who may enter its privately owned exchange room and there enjoy the privilege of trading.

If the State of Illinois has the power to establish and maintain public markets, it might under its right of eminent domain take this exchange building and make it a public market and then admit to the trading privileges there such persons as it thought fit.

It may be also, if this trading on this exchange were interstate commerce, that Congress might also acquire this exchange building and make it a public market, to which all might resort under such restrictions as Congress might see fit to impose; but such act by Congress or the state could only be upon the payment of adequate compensation.

This Future Trading Act does not contemplate such a taking; nor does it seek to make these grain exchanges *public* markets. For a market—to be public—must be one to which all classes of traders may resort. This act gives the right of access only to a particular class—co-operative associations of farmers, who are only on the selling side of the market. They who are on the buying side of the market—the exporters, millers and consumers—are not given the right to form associations and have their representatives admitted to membership under an immunity from compliance with the commission rule of the exchange.

The question, therefore, is whether Congress may, without violating the Fifth Amendment to the Constitution, compel the admission to membership in the exchange of persons, who otherwise would not be acceptable as mem-

bers, and this without payment of any compensation whatever to the exchange or its members.

This question is not to be confined to the power as exercised by this act. "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." (*Brown* v. *State of Maryland*, 12 Wheat. 439.) If the power exists at all, it authorizes Congress to compel the admission to membership of *all* persons now pecuniarily disadvantaged by not being members. If farmers may organize, and through a representative get admittance to this exchange and there sell all their grain through the exchanges *at cost*, Congress may also force into the exchanges representatives of associations of millers, exporters, etc., who may also wish to enjoy the facilities, which the exchange provides, for the purpose of *buying* at cost.

While the extent of the impairment of the property right is not here a vital question, we cannot refrain from here pointing out the injurious results of such legislation, and thereby bringing to the attention of the court more fully the nature of the right which this Act impairs.

The exchange itself transacts no commercial business. It neither buys nor sells. It is not an organization for profit. It neither contemplates, nor has ever declared, any dividends. It is merely an instrumentality by means of which its members join in providing and maintaining an exchange hall where they may meet to trade as individuals, and by means of which they may determine who are fit persons to share these trading privileges and they may promulgate rules to control their business relations and to fix the terms of, and to enforce, the contracts which they make with one another, and to settle the business disputes arising therefrom.

Its principal source of revenue is the yearly assessments of its members, which now produce $240,000 a year.

Hence the exchange must make it profitable for a sufficient number of persons to become and remain members; and this can be done only by making the value of the benefit that the membership confers upon the member exceed his share of the expense of maintaining the exchange. If the members find no profit or advantage in trading, a membership will have little,—and if any, only a sentimental—value, which would not be enough to induce members to pay the large assessment necessary to meet the expense of maintaining the exchange.

There are several ways, in which an exchange makes the privilege of membership valuable enough to attract members. It maintains an exchange hall, where the making of trades is convenient and economical. It confines trading there to those who are members, thus making it necessary for non-members to employ members as agents, if they desire to share in the trading. But, if Congress or a state may compel the exchange to give access to the salaried agents of all those, who would otherwise employ members to make trades on a commission basis, the business of making trades for others on a commission—which comprises a substantial part of the business of the members of an exchange—will be destroyed or seriously impaired, and it would no longer be profitable for that class of members to remain members.

But it is not enough for an exchange merely to confine trading to its own members and thereby enable them to profit by acting as agents for non-members. To function properly, it is necessary that it should attract and retain members of the right character and credit.

One of the things essential to the successful maintenance of an exchange is its disciplinary power over its members. It must compel them to abide by their con-

tracts, and otherwise maintain a high standard of business integrity. An exchange can do this only by the exercise of its disciplinary power to expel or suspend members, who are guilty of uncommercial conduct, or default on their contracts. But the fear of suspension or expulsion loses much of its deterrent influence when the privilege of remaining a member becomes of little value. Hence, all exchanges have found it necessary to give value to the privileges of the membership by prescribing minimum rates of commission to be charged by members when acting as agents for others.

This the courts recognize as a legitimate function of the exchange. The Illinois courts have held valid the minimum commission rule of the Chicago Board.

Board of Trade v. *Dickinson*, 114 Ill. App. 295.

The courts of other states concur in this view.

State v. *Duluth Board of Trade*, 107 Minn. 506.

To render this commission rule effective, it is necessary to prohibit—as this Board does (Rec., 5)—members from directly or indirectly rebating to their principals any part of their commissions.

It is alleged in the bill—and admitted—that this commission rule has materially added to the value of memberships on this Board. (Rec., 6.)

This Future Trading Act entirely nullifies this commission rule as respects these farmers' organizations, as is more fully explained in the Statement of this brief at page 8. It permits the farmers of a state, or of a wider territory, to join one association, designate one of its salaried officers as its representative, have him admitted to the exchange, and by the means of the "patronage dividends" have all their grain sold there *at cost*.

And this is no idle fear or remote contingency. For

it is alleged in the bill—and admitted—that, in addition to a large number of existing farmers' co-operative companies, an organization has recently been formed and is functioning—the "U. S. Grain Growers, Inc."—which proposes to avail itself of this law to market the grain of all farmers at cost by resorting to these "patronage dividends." (See the elaborate contracts through which this is being accomplished, which are set out at pages 22 to 40 of the record.)

Thus, the present act impairs—and the full exercise of the power claimed for Congress would completely destroy—the right of this exchange, not only to retain sufficient members to derive the income necessary to meet its expenses, but would also impair the disciplinary power of the exchanges over their members.

It therefore seems clear that Sec. 5 (e) of the Act violates the 5th Amendment of the Constitution, and that the protection of his amendment is available, not only to the Board itself, but also to its members, who are the beneficial owners of the exchange building and of the facilities which the exchange provides.

There is still another aspect of this question. Each of these 1,610 privileges of membership in this Board is a valuable right—a species of property—which is now worth about $7,000. It has a saleable value because an incoming member may tender the transfer of a membership of an outgoing member in lieu of his initiation fee. This court has held memberships in some exchanges to be assets in bankrutpcy.

Hyde v. *Woods*, 94 U. S. 523.
Page v. *Edmunds*, 187 U. S. 596.

This valuable right belongs to the individual member and he may sue to protect it, especially where the Board refuses to do so. (*Dodge* v. *Woolsey*, 18 How. 331.)

Furthermore, the relationship between the members and the Board (Rec., 4) gives rise to an obligation of the exchange to abide by its rules. (*Ryan* v. *Cudahy*, 157 Ill. 108.)

One rule provides that no person shall be admitted to membership unless 10 of the 18 directors shall regard him of good character and credit. Doubtless this rule must yield to a valid statute, but not to one which is unconstitutional—as is the present Act. As the Board and its directors propose to comply with this Act and admit to membership representatives of farmers' associations in utter disregard of this rule, the individual members have the right to compel by injunction their compliance with the foregoing rule. This in itself constitutes a sufficient basis for this suit.

Again members may as individuals maintain this suit because, if this Act succeeds in permitting the members of farmers' organizations to market their crops at cost through the exchange, it will—as alleged in the bill and admitted (Rec., 7)—in time destroy the business of the many members who now receive grain on consignment and sell it on commission, and ultimately much impair, if not wholly destroy, the value of all memberships, which are the property of the individual members.

The federal court at Kansas City (Circuit Judge Stone, District Judges Pollock and Munger), recently issued a temporary injunction restraining enforcement by the Attorney General of a statute of Missouri, which—like section 5 (e)—compelled the grain exchanges of that state to admit to membership representatives of farmers' cooperative associations. No opinion was filed.

It is, therefore, respectfully submitted that Sec. 5 (e) of this Act violates the 5th Amendment to the Constitution.

III.

THE PROVISIONS OF THE ACT WHICH AIM TO REGULATE BOARDS OF TRADE ARE NOT WITHIN THE COMMERCE POWER OF CONGRESS.

According to its title the Act is one (1) to tax certain transactions, and (2) to regulate boards of trade.

Thus this statute differs from some, which have come under review by this court, and which on their faces appear to be merely an exercise of the power to levy taxes. In such cases this court has felt itself deterred from going behind the profession of the statute to infer an ulterior motive in Congress.

Here this court is under no such restraint. Congress by the title has said that parts of this Act are not the exercise of the taxing power, and has left this court free to treat as the exercise of the commerce power those provisions of the Act, which are clearly regulatory in character. Such are

1. The provision of Sec. 4 (b) which requires *members* of a board of trade to evidence each contract for future delivery by a written memoranda showing, "the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery," and requires that such memoranda be kept for a certain time and be open to the inspection of the Departments of Agriculture and Justice.

As the Act does not contemplate the payment of a tax by such members this clause is clearly one of the regulating provisions of the Act.

2. The provisions of Sec. 5 (b), which requires (a) the Board to provide by its rules (there is no other way of providing) for the making and filing, either by the Board or its members, as the Secretary may direct, of *reports*

in the form and at the times prescribed by him "showing the details and terms of all transactions entered into by the board or the members thereof," and (b) also the keeping of permanent *records*, either by the board or its members, as the Secretary of Agriculture may direct, showing the details and terms of all such contracts, the parties thereto, the assignments and transfers thereof, and the manner in which said transactions are fulfilled. Such records are required to be preserved for a certain time, and to be open to the inspection of the Department of Agriculture and the Department of Justice. This even authorizes the Secretary of Agriculture to compel this Board itself to make reports and keep records of the transactions of its members.

The foregoing provisions relate to transactions, which are not taxed by the Act and are, therefore, clearly some of the regulating provisions of the Act.

3. That provision of the Act, Sec. 5 (c) which requires the Board to admit to membership all duly authorized representatives of co-operative associations of producers, and nullifies the commission rule of the exchange as respects such representatives. The transactions of these new members are not taxed and this provision is purely regulatory.

4. That provision of the Act which requires the Board to make effective (by suspending or expelling the member) any order, which the Secretary of Agriculture may make under Sec. 6 (b), directing the boards of trade to refuse all trading privileges to any person—whether member or not—who shall, in the opinion of the Secretary, violate any of the provisions of the Act.

5. Sec. 5 (c) (d), requiring the Board to prevent the dissemination by the Board or any of its members, of false reports that may tend to affect the price of grain,

and also requiring the exchange to provide for the prevention of manipulation and "corners."

6. Section 9 of the act which provides for the investigation of boards of trade by the Secretary of Agriculture.

As the Act does not impose any tax upon a board of trade, or its members, all the foregoing provisions requiring action by the board of trade, or authorizing investigations by the Secretary of Agriculture, are clearly regulatory in character.

Hence the question here is, whether any of the objects of these regulating provisions are sufficiently interstate in character to be embraced within the power of Congress.

First. Is that provision of Sec. 5 (e) which modifies the commission rule of the exchange in the interest of co-operative associations of producers—which in effect prescribes what certain members of the exchanges may charge their principals for selling grain—within this commerce power?

That question is answered in the negative in

Hopkins v. *United States*, 171 U. S. 578,

where this court held that a rule of a live stock exchange, which prescribed the rates of commission, did not invade the field of interstate commerce, saying:

> "The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the state from other states or from the territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city. * * *

"On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce."

Second. Let us next consider such of the above regulations as relate to contracts for the sale of grain for future delivery. The bill (Rec., 7-11) describes the character of future trading on this exchange, as follows:

"Such contracts relate almost wholly to wheat, corn and oats, and the volume of such trading is so large, that said Board has set aside in its exchange room three separate spaces, upon each of which it has constructed a circular raised platform, commonly known as a 'pit,' where its members may conveniently, and do daily, gather and make such contracts with each other by open *viva voce* bidding; and respecting such trading the rules of said Board have for many years required, and now require, that all orders received by members to buy or sell for future delivery must be executed in the open market upon its exchange room and only during the hours of regular trading; and said rules also provide that no trade or contract for future delivery shall be made or offered to be made by any member of said Board, except between 9:30 a. m. and 1:15 p. m., except on Saturday, when the trading must close at 12 o'clock M., by reason whereof all such trading in grain for future delivery by members of said Board is in fact confined to said Exchange room and said market hours; and both buyers and sellers in all said contracts are personally present in the City of Chicago when the contracts are made; and another rule of said Board requires that any offer to buy or sell for future delivery when made openly in the exchange room during the hours for regular trading, may be accepted by any other member of said Board, and that the contract shall be made with the member first accepting said offer.

"That all such contracts for future delivery contemplate and provide for the delivery of warehouse receipts instead of the grain, and only of such warehouse receipts as the rules of said Board make valid for delivery; that a rule of said Board now and for many years in force [see Rec. p. 20], provides that only such warehouse receipts shall be deliverable upon contracts for future delivery as shall be issued by warehouses which have complied with the rules, regulations and requirements of said Board, and have been by the Board of Directors declared regular warehouses for the storage of grain; and none of the warehouses thus made regular are located outside of the State of Illinois; and said rules also make it the duty of the Board of Directors on the first of July in each year to designate the grain elevators or warehouses in Illinois whose receipt shall be deliverable between its members on their contracts for future delivery for the ensuing year; but said rule also provides that said Board of Directors may declare, as regular elevators, only such elevators or warehouses as have been licensed by the State of Illinois to conduct a public warehouse, pursuant to the provisions of a statute of that state [Ill. Rev. St. Ch. 114, Sec. 139, 140, 148] * * * which said Act provides that it shall be the duty of every warehouseman of Class 'A' to receive for storage any grain tendered him and to mix such grain with other grain of a similar grade received at the same time as near as may be, and such statute further provides that the warehouse receipt issued for such grain so received into said warehouse shall state on its face that the grain mentioned therein has been received into store, to be stored with other grain of the same grade received about the same time as the date of said receipt; and by said Act it is further provided that, when any holder of any such warehouse receipt shall demand the delivery of the grain therein mentioned, said proprietor shall deliver on said receipt such of the grain of that particular grade as was first received by him in store or which had been the longest time in store in his warehouse; and, while said statute provides that, with the consent of any depositor of grain and the proprietor of a warehouse, the particular grain of

said depositor may be kept in a bin by itself, apart from that of other owners, and that such bin shall be marked and known as a 'separate bin,' and that the receipt therefor, shall so state and contain the number of such special bin, grain in Chicago is seldom, if ever, stored in a public warehouse of Class 'A' in a special bin, and if so stored the warehouse receipts issued for such grain are not, and never have been, deliverable upon said contracts of future delivery made by members of said Board; nor has said Board ever declared a regular elevator under said rule any warehouse which has not been licensed under said statute to conduct a warehouse of Class 'A.' * * *

"That the space of each of said warehouses is subdivided into numerous partitions or bins, the capacity of said bins ranging from 2,000 bushels to 7,000 bushels; and that almost all grain is received in Chicago upon cars, whose capacity is from 1,500 to 2,000 bushels, and whenever a carload of grain is unloaded into any of said elevators of Class A, it is immediately carried into one of said bins and is there at once mixed with other grain of like grade already stored in such bin, and thus any individual carload of grain immediately loses its identity upon being received in such warehouse; and when the person, to whom the warehouse receipt is issued for such carload of grain, or his assignee, tenders said warehouse receipt to said warehouseman for the purpose of having the grain therein specified delivered to him, he never gets the identical grain delivered to such warehouse when it issued said receipt.

"That in this trading for future delivery on the exchange of said Board during any year many millions of bushels of wheat, corn and oats are bought and sold for future delivery, and as respects at least three-quarters of the grain covered thereby, said contracts are fulfilled or settled without any delivery of any warehouse receipts, but are settled through a system of offsetting purchases with sales and the payment of differences in the market prices under a system commonly known as the 'ringing' system which is provided for by the rules of said Board; and that practically all said remaining future contracts are performed or completed during the

month specified for delivery by the delivery by sellers to buyers of warehouse receipts of public warehouses of Class 'A' which warehouses have been made regular under the said rules of said Board.

"That while said Rule XXI makes grain in cars deliverable on future contracts during the last three days of the delivery month mentioned in said contract, where receipts are issued by the carrier, it is also provided by said rule that said delivery shall not be complete, and that bills for said grain so tendered shall not be payable, until said grain shall have been unloaded into an elevator which has theretofore been made regular for delivery by said Board of Directors, and elevator receipts covering said grain shall have been delivered to the buyer; and that the amount of grain in carload lots actually delivered under the provisions of this rule on contracts for future delivery is much less than 1 per cent of the total volume of said trading for future delivery and even a very small percentage of the total quantity of grain actually delivered upon said contracts; and that, while said rule also authorizes said Board of Directors, when an emergency exists, to provide that grain in cars may be tendered during any business day of the month specified in the contract for future delivery, said rule also provides that such tender shall not be deemed a complete delivery until such grain shall have been unloaded into an elevator made regular by said Board and the warehouse receipt therefor shall have been delivered to the buyer; and while said Rule XXI also authorizes said Board of Directors, when an emergency exists requiring more storage room than can be supplied by the regular elevators, to make other places suitable for the storage of grain regular for storage of grain deliverable under the rules of the Board, said Board has seldom, if ever, been able to induce proprietors of places otherwise suitable for the storage of grain to qualify under the Warehouse Statute of the State of Illinois for the short period of time during which any such emergency exists, and that the quantity of storage room in Class 'A' warehouses declared regular by said Board of Trade is such that an emergency, such as is contemplated in said rule, rarely occurs in Chicago, and then lasts for only a short period of

time, and that at the present time said Board of Directors of said Board have not exercised said emergency powers conferred upon them, and the only grain now deliverable on said future contracts is grain for which warehouse receipts have been issued by said regular elevators, and carloads of grain tendered during the last three days of the delivery month followed by delivery of warehouse receipts when such grain is unloaded into a regular elevator." (This future trading on this exchange was before this court in *Board of Trade* v. *Christie*, 198 U. S. 236.)

Thus, all contracts for future delivery of grain made by or through members of this Board are made in its exchange room in Chicago during certain market hours only, and the only parties to these contracts are members then and there present.

Less than one-quarter in volume of these contracts are performed by delivery, and upon such contracts the delivery is of warehouse receipts entitling the holders to receive a specified number of bushels of grain of a particular grade out of a larger common mass in store. These receipts on their face state that the grain, for which they are issued, has been mixed with other grain of the same grade; and when the receipt holder calls for his grain the warehouseman, to comply with the state law, makes delivery out of the grain *that has been longest in store.* If any component parts of the common mass of grain, out of which the receipt is filled, have come from other states, they have completely lost their interstate character by this inter-mixing.

Are such contracts for the future delivery of grain interstate commerce? This question seems fully answered in the negative by this court in the case of

Ware & Leland v. *Mobile County*, 209 U. S. 405, where a statute of Alabama imposing a tax upon correspondents in Alabama of members of the New York

Cotton Exchange and Chicago Board of Trade was upheld, because the only business of these correspondents was to receive in Alabama orders from residents of that state, to be transmitted by wire to the brokers at the exchange cities, who executed the orders by making upon the exchange the required contracts with other members there present. This court stated:

> "The appellants are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. * * * For that part of the transactions, merely speculative, and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery, as result in actual delivery of the grain or cotton, the stipulated facts show that when the orders transmitted are received in the foreign state the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers.
>
> These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of pur-

chase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

This court treated that case as involving only contracts for the future delivery of bales of cotton, which do not lose their identity by being mixed or stored in a common mass with other cotton of like grade. The case at bar, therefore, is much stronger because all grain shipped from other states, which is carried into this future trading on the Chicago Board, does completely lose its identity when stored in Chicago elevators, and long before it is in any way connected with this future trading.

The *Ware & Leland* case is cited with approval in

Engel v. *O'Malley*, 219 U. S. 139.

N. Y. Life Ins. Co. v. *Deer Lodge Co.*, 231 U. S. 496, 511.

Other decisions of this court support the principle of the Ware case. Thus in

Hopkins v. *United States*, 171 U. S. 578

(more fully cited on page ... of this brief,) it was held that the business of selling live stock on an exchange by members thereof, who were acting as agents for the owners, was not interstate commerce.

Brown v. *Maryland*, 12 Wheaton, 419.

(the first expression of the original package doctrine) where this court held that the property lost its distinctive character as an import, and also its interstate character if, after being brought into a state, it has "become incorporated and mixed up with the mass of property in the country"; and that doctrine has been applied so as to cause all property brought from one state to another to lose its interstate character in the following cases:

Where a box or case is brought into a state contain-

ing many smaller packages or bottles and these smaller packages or bottles are removed from the case for sale.

May v. *New Orleans*, 178 U. S. 496.
Austin v. *Tennessee*, 179 U. S. 343.
Purity Extract Co. v. *Lynch*, 226 U. S. 192.
Weigle v. *Curtice Bros. Co.*, 248 U. S. 285.

When natural gas is piped from one state to another and there distributed by a local company through its local pipes.

Public Utilities Co. v. *Landon*, 249 U. S. 236.

When moving picture films are brought from other states and unrolled and exhibited to audiences.

Mutual Film Corporation v. *Ohio Industrial Commission*, 236 U. S. 230.

When gasoline is brought into a state in tank cars, from which it is sold in quantities to suit purchasers.

Askren v. *Continental Oil Co.*, 252 U. S. 444.

Now let us consider the grain purchased through this future trading by persons who contemplate *shipping* it beyond the state.

Contracts which by their terms contemplate the shipment of grain across state lines are, of course, interstate commerce. But the purpose or intention of some of the purchasers in this future trading upon this exchange to ship out of the state property they purchase does not make their contracts for future delivery made in these "pits" interstate contracts. And if one such contract is not, a large number of such contracts do not constitute, interstate commerce.

United States v. *E. C. Knight Co.*, 156 U. S. 1, 13.
Coe v. *Errol*, 116 U. S. 517.
New York Central v. *Mohney*, 252 U. S. 152.
Arkadelphia Co. v. *St. Louis Ry. Co.*, 249 U. S. 134, 151.

Bacon v. *Illinois*, 227 U. S. 504, 516.
Merchants Exchange v. *Missouri*, 248 U. S. 365.
Hammer v. *Dagenhart*, 247 U. S. 251.
Crescent Oil Co. v. *State of Mississippi*, decided by this court November 14, 1921.

In the *Arkadelphia case, supra*, the fact that as to 95 percent of the products the parties must have contemplated shipment out of the state was held immaterial. In the *Merchants Exchange case, supra*, it was held that a state statute requiring that all grain should be weighed by state officials did not burden interstate commerce, although the grain in large part was shipped in or out of the state.

It has been urged in the North Dakota case now pending before this court that the foregoing rule should not apply where 90 per cent of the grain raised in North Dakota is purchased by persons who intend to ship it out of the state. If this view shall prevail, it will not take the case at bar out of the general rule above stated, because in more than three-quarters in volume of this future trading, the parties do not make deliveries, and therefore do not contemplate shipments out of the state; and undoubtedly in a substantial part of the balance of those contracts (upon which deliveries do take place) the grain is purchased by or for Illinois millers by speculators who sell the warehouse receipts again, by local warehousemen who purchase the grain to keep it earning storage in their elevators, by local investors who buy "cash" grain and sell it for forward delivery with a view of making a profit out of the prevailing carrying charges, etc.—thus leaving an indefinite but small percentage of this future trading, in which the purchasers buy intending to ship out of the state.

All this future trading, therefore, should be regarded as

intrastate commerce, the regulation of which is not within the commerce power of Congress.

This would nullify, because violative of the Federal Constitution—at least as respects this Board—(1) so much of Sec. 4 (b) as requires members of a board of trade to make and keep memoranda of their sales for future delivery, and exposes such memoranda to the Department of Agriculture or Department of Justice; (2) also so much of Sec. 5 (b) as requires a board of trade to provide for the making, filing and keeping for three years, either by it or its members, of reports and records of all contracts for future delivery, and gives the Secretary of Agriculture and Department of Justice access thereto, and (3) also Sec. 5 (f) so far as it makes obligatory on a board of trade to make effective the orders of the Secretary of Agriculture by depriving persons violating the act of the privilege of making future contracts, (4) also Sec. 9 so far as it authorizes the Secretary of Agriculture to investigate future trading on boards of trade.

Third. Let us consider together the other regulatory provisions of the Act above referred to, which require—Sec. 5 (e)—boards of trade to admit to membership representatives of farmers' organizations and permit "patronage dividends," and require—Sec. 5 (b)— boards of trade to provide that reports and records be made and kept of *cash* transactions, and to prevent false reports affecting prices, or the manipulation or cornering of grain, (Sec. 5 (c) and (d)) and which provide (Section 9) for the investigation by the Secretary of Agriculture of boards of trade as respects their cash transactions.

This presents the question whether what this Board does is interstate commerce, or is merely an aid or facility to commerce, and as such beyond the power of Congress.

We have here a non-profit corporation created by a

state, which does no business itself and whose chief function is to furnish in Chicago an exchange hall where its members individually may conveniently and economically transact business. To that end it provides for the admission as members of only such persons as seem to it to be fit in point of character and financial responsibility, it provides a method by which members, who default on their contracts or otherwise misbehave, may be suspended or expelled, it provides rules respecting the terms of the contracts made by its members in the absence of express stipulations to the contrary, it provides arbitration committees to decide the business disputes of its members, and it promulgates and enforces rules to control the business relations of its members to each other and to the exchange itself.

Should not all these be treated as together constituting an instrumentality, which is but an aid to commerce?

Much the larger part of the trading between members in the exchange hall is so-called future trading, which, as already shown, is not interstate commerce. Another substantial part of the trading in the exchange hall is that of members who, as agents, receive grain on consignment to sell and account for the proceeds or buy grain as agents—which, so far as the business of these agents is concerned, has been held by this court not to be interstate commerce. The bidding for, or offering, grain by letters or telegrams sent by members is in no sense a part of the trading on the exchange. Hence, if any, only a minor part of the total volume of trading on this exchange possesses any of the characteristics of interstate commerce.

From the foregoing facts does not the conclusion arise that the maintaining of this exchange hall—and everything that the Board does in connection therewith—lacks any element of interstate commerce within the definition

that this court has frequently given to that term? Hence, is not Congress without power to regulate this exchange.

Such seems to have been the practical construction of state and federal legislators for more than one hundred years prior to the passage of this Future Trading Act.

The stock brokers organized what is now the New York Stock Exchange as early as 1792, and it became a formal organization in 1817. For many years there have existed in some states, stock, grain, cotton and coffee exchanges. The Chicago Board of Trade was first organized as a voluntary association in 1848.

During all this time the states, in which these exchanges have been located, have enacted numerous laws calculated to suppress or minimize the abuses, which these exchanges inevitably give rise to. Illinois at first prohibited "puts" and "calls" (*Booth* v. *Illinois,* 184 U. S. 425), but later permitted these contracts when not used for gambling purposes. Illinois R. S., Ch. 38, Sec. 130. See *Brodnax* v. *Missouri,* 219 U. S. 285.

During all this time Congress has passed no statute to regulate, under its commerce power, these exchanges. It has imposed a prohibitive tax upon such contracts for the sale of cotton as contain certain objectionable terms, but this statute does not seem to be harmful enough to have invited a contest upon its constitutionality.

In 1892, a bill was introduced in Congress to suppress future trading on the grain exchanges through an exercise of the taxing power, but this bill was defeated. (See page 58 of this brief.)

Hopkins v. *United States,* 171 U. S., 578.

seems to support the view here urged. There the business of members of a live stock exchange, who were engaged in receiving from other states cattle to be sold by them on the exchange for the account of their principals,

was held not with the Sherman Anti-trust Act, because it was not interstate commerce, but a mere aid or facility to commerce. The agent in selling the cattle for their owner simply aided him in finding a market. This court said:

> "They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature. * * *
>
> We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from states different from the one in which the exchange is situated and the sale made."

This being so, how can a corporation, which merely furnishes to traders a *hall*, where they may do this trading, be deemed engaged in interstate commerce? Surely the exchange, which furnishes a hall for the trading, is much farther removed from the trading than are the members who occupy this hall and actually participate as agents in the trading there.

Nathan v. *Louisiana*, 8 How. 73, 80,

where, it was held that a broker, who only bought and sold foreign exchange, was not engaged in interstate commerce, but only "in supplying an instrument of commerce" like a shipbuilder.

The Board of Trade, in furnishing a building where traders meet to make contracts—only a small portion of which relate to grain which has, before the sale on the exchange is made, come across state lines, or is to go across state lines after it reaches the purchaser on the

exchange—seems to have no more connection with interstate commerce than have the owners of the grain-mixing warehouses of Chicago, which store much grain that has come from, or is to go to, other states. Yet it has never been thought that these public warehouses are a part of interstate commerce or anything more than an aid thereto. Indeed, this court in

Munn v. *Illinois*, 94 U.S. at p. 135,

held these elevators not to be a part of interstate commerce, saying:

> "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done."

This is approved in

Covington v. *Kentucky*, 154 U. S. 213.

Other decisions supporting this view are:

Budd v. *New York*, 143 U. S. 517-545,

where a statute of New York prescribing the charges for passing grain through floating and stationary elevators was enforced against one operating a floating elevator,

through which grain was transferred from one vessel to another, and this court held that this instrumentality was not a part of interstate commerce, saying: (page 545.)

> "It operates only within the limits of that State, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn* v. *Illinois*. It is of the same character with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State, and other kindred laws."

This court has also held that:

> "The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse."
>
> *Paul* v. *Virginia*, 8 Wall. 168.
>
> *Hooper* v. *California*, 155 U. S. 648.
>
> *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389.

Again in

Merchants Exchange v. *Missouri*, 248 U. S. 365,

this court held that the board of trade in Saint Louis, in maintaining a bureau for weighing, and in granting weight certificates, and in making charges therefor respecting grain received from, or shipped to, points without the State, was not engaged in interstate commerce, and that a State statute, which displaced such bureau, was not an interference with that commerce. In

Brodnax v. *Missouri*, 219 U. S. 285,

the officers of the Kansas City Board of Trade were indicted under a state statute, which made it unlawful for any person or corporation to keep or cause to be kept within the state any *place*, wherein is permitted the buying and selling for future delivery of grain, etc., on margins when the seller does not cause to be made at the time of sale a complete record of the transaction and affix a stamp thereto. The only place kept by the defendants

was the exchange hall. In overruling the contention that the statute violated the commerce provision of the Constitution, this court said:

> "All that the defendant offered to show in this connection was that a substantial part of the sales referred to were of grain * * * which were at the time of sale in course of transportation as articles of interstate commerce. * * * We add that the indictment deals with the *place* where sales, such as the statute describes, are made, and the offense is complete under the statute, by the keeping of such a place, and that occurs before any question of interstate commerce could arise, so far as this record discloses."

Thus in that case this court seems to hold that statutes relative to the keeping of the place—the exchange room—are exclusively within the police power of the states.

The following cases also support the above contention:

House v. *Mayes*, 219 U. S. 270.

Pittsburgh Co. v. *Louisiana*, 156 U. S. 590.

Blumenstock Bros. v. *Curtis Pub. Co.*, 252 U. S. 436.

Williams v. *Fears*, 179 U. S. 270.

Cargill Co. v. *Minnesota*, 180 U. S. 452, 470.

Ficklen v. *Shelby Co.*, 145 U. S . 1.

U. S. Fidelity Co. v. *Kentucky*, 231 U. S. 394.

It is not here claimed that, if elevator or board of trade does some act, which prejudicially touches, or will interfere with interstate commerce—as was claimed of a rule of this Board in *Board of Trade* v. *United States*, 246 U. S. 231, or if members of an exchange conspire to run a corner "*affecting the entire trade of the country*" in a particular commodity, as in *United States* v. *Patten*, 226 U. S. 525,—Congress may not, as to such encroachments, enact a prohibiting act.

All that we do contend is that—considering together

this Board of Trade and all its activities—the general regulation thereof as respects admissions to membership, commission rates, what, if any, memoranda of contracts should be made, etc., should be held to be a part of intrastate commerce, and within the exclusive power of the state.

As stated in

Hammer v. *Dagenhart*, 247 U. S. 251, 273, 275,

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution. * * *
>
> The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government."

It is therefore submitted that, at least as respects all the regulatory features of this Act referred to on pages 31-33. of this brief, this Act is, as respects this Board, an unconstitutional invasion of the rights of the state to regulate its internal commerce, and it should be adjudged to that extent invalid, unless the Act can, in these particulars, be held to be a proper exercise of the power of Congress to impose taxes.

IV.

THE POWER TO TAX.

It may be helpful here to refer to a few considerations —which in this court have become mere truisms—concerning the original purposes, which the framers of our Constitution had in view in adopting that instrument.

When the states through their representatives convened to frame a constitution, one consolidated govern-

ment of all the states was not their purpose. The states were already organized under governments, which possessed sovereign powers and were competent to regulate their entire internal policy.

The differences in institutions and interests of these different communities made it impracticable to adopt a consolidated government having control of all internal affairs. What the convention sought to do was to single out certain governmental functions, which could not be fully exercised separately by the individual states and to lodge these in a central authority capable of acting for the whole. This contemplated the surrender only of the common interest to a common control, leaving each individual state to shape its own internal policy and therein work out its own destiny in its own way. To this end, the Constitution *enumerated* all the powers intended to be bestowed upon the Federal Government.

When the draft of the Constitution was submitted to the several states for their approval, it met a storm of opposition arising out of the fear that the proposed Constitution would deprive each state of its right to regulate its own internal affairs. To meet this the responsible proponents of the Constitution gave assurances,—without which the Constitution could not have been ratified—that immediately upon its adoption, amendments thereto would be made expressly safeguarding the right of the several states to legislate exclusively on subjects purely intrastate; and this assurance was made good by the adoption of the 10th Amendment declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

Thus the Federal Government became one of delegated powers, by which is meant that each of such powers is bestowed for a certain purpose and may not be ex-

ercised except for such purpose. Thus every power granted by the Constitution, whether express or implied, may only be exercised for the *purpose*, for which it was granted. If this were not so, there would be no limitation whatever upon its exercise; it becomes a mere arbitrary power; and none the less arbitrary where Congress, under the pretext of the exercise of one power that it has, undertakes to exercise a power that it has not.

These principles this court proclaimed in

McCulloch v. *Maryland*, 4 Wheaton 315, 420, 421.

Speaking through Chief Justice Marshall, it said (the italics being ours):

> "*Let the end be legitimate*, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. * * * Should Congress in the execution of its powers, adopt measures which are prohibited by the Constitution; or *should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to* the Government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." In

Legal Tender cases, 12 Wall. 535,

this court, in re-stating this principle, added, "there must be some relation between the means and the end; some adaptiveness or appropriateness of the laws to carry into execution the power created by the Constitution."

In passing upon state statutes claimed to violate the Federal Constitution this court has frequently looked through the form to the substance, and brushed aside anything in the nature of a subterfuge.

Thus a state may, without encroaching upon the foreign commerce power of Congress, enact a statute, whose

purpose is to prevent the introduction within its limits of persons liable to become public charges, and which requires that masters of vessels, upon arrival, list their passengers and give bonds indemnifying the state against the burden of supporting them. (*City of New York* v. *Miln*, 11 *Peters* 102.)

But it is an invasion of the commerce power of Congress for a state to enact a statute exacting a fixed sum for every passenger landed, whether liable to become a charge or not. (Passengers Cases, 7 Howard 283.)

After these decisions the State of New York attempted by a statute to provide for the giving of bonds of indemnity, but also to allow the masters of vessels, if they chose, to avoid the giving of bonds by paying a fixed charge for each passenger. Out of the fund thus created the state was to be indemnified against the expense of supporting pauper immigrants. This last statute was plainly so framed as to make it preferable for the master to pay the money instead of giving a bond, and it was thus in a *roundabout* way exercising a power, which the state did not possess. This court in

Henderson v. *Mayor*, 92 U. S. 259, 268,

held the act unconstitutional, saying (the italics are ours):

> "In whatever language a statute may be framed its *purpose* must be determined by its *natural and reasonable* effect, and if it is apparent that the *object* of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore," it is a tax on passengers.

Again this court, in considering a statute imposing wharfage fees adhered to the same view in

Morgan v. *Louisiana*, 118 U. S. 455, 462.

> "In all cases of this kind it has been repeatedly held that, when the question is raised whether the

state statute is a just exercise of state power, *or is intended by a roundabout means to invade the domain of Federl authority*, this court will look into the operation and effect of the act to discern its purpose."

Similar cases are:

Chy Lung v. *Freeman*, 92 U. S. 275.
Cannon v. *New Orleans*, 20 Wall. 577.
Minnesota v. *Barber*, 136 U. S. 313, 320.
Soon Hing v. *Crowley*, 113 U. S. 703, 710.
Mugler v. *Kansas*, 123 U. S. 661.
Loan Association v. *Topeka*, 20 Wall. 655.

This court in many cases has nullified every form of state interference with the powers of Congress over interstate and foreign commerce "no matter how closely allied to powers conceded to be in the states." (*Henderson* v. *Mayor*, 92 U. S. 272.)

It surely will be no less ready to condemn any form of congressional interference with a state's right to regulate its internal commerce, "no matter how closely allied to powers conceded to be" in Congress. If a state statute will be annulled when a mere pretext, or a roundabout way of exercising a power not possessed, then an act of Congress of the same character should be also declared invalid.

This leads us to a consideration of the power of Congress to lay internal taxes.

Immediately following the Declaration of Independence, the colonies had become states and later entered into the Articles of Confederation, under which each state retained "its sovereignty * * * and every power * * * not expressly delegated to the United States in Congress assembled." These Articles conferred on Congress no power to tax. The several states undertook

to supply to a common treasury the necessary funds for the purposes of the Confederation.

Thus each state, before the present Constitution was adopted, possessed the only power to levy taxes, and this power was unlimited except so far as it was restricted by the state's constitution.

When a stronger union was found necessary the proposed Constitution did not seek to confer, and the states were unwilling to give to Congress, the general power to lay internal taxes for every purpose. The Constitution expressly limited the powers to certain purposes—which were necessarily expressed in general terms. It proposed to confer, and its adoption conferred, on Congress the "power to lay and collect taxes, duties, imposts and excises, to pay [for the purpose of paying] the debts and provide [providing] for the common defense and general welfare of the United States."

We are concerned here only with the extent of this power as respects internal taxes.

The protective tariff was then an established governmental system in England and elsewhere, and doubtless the Constitution contemplated that in the laying of *imposts* Congress might fix the duties with a view to excluding importations rather than raising revenue.

But there is no warrant for saying that at that time the power to lay internal taxes had any other legitimate purpose *than the raising of revenue;* or that the states in conferring on the national government a concurrent power to levy taxes, ever contemplated that Congress might exercise that power for any other purpose than to raise revenue.

This, we think, is apparent for this reason:

Under its then existing constitution each state had unlimited power to regulate the commercial and other trans-

actions of its citizens. Resort to a roundabout way of doing this through the levying of taxes was not necessary. This is also true of the governments of Europe. There was nowhere any dual system of government requiring a written constitution to accurately separate and define the powers that belong to each of the separate governments, and hence no occasion or incentive to use the taxing power as a cloak to accomplish something other than getting revenue.

Indeed, does anyone suppose that—considering the pronounced disinclination of the states to surrender their own powers—the Constitution would have been adopted by the requisite number of states, if John Marshall in Virginia and Alexander Hamilton in New York, had responded affirmatively to the question, whether the proper exercise of power to tax thus to be conferred, included also the power to regulate, or to prohibit each state from regulating, its internal trade and other local affairs.

In *McCulloch* v. *Maryland*, 4 Wheaton 317, 431, was presented to this court the questions, whether Congress had power to incorporate, as one of the agencies of the Government, the United States Bank, and this court having decided that it had—whether the State of Maryland could impose a tax upon a branch of that bank located in that state. In deciding that the state statute, in providing such a tax, was an illegal encroachment upon this Federal power, this court (Chief Justice Marshall) made use of the expression, "that the power to tax involves the power to destroy." That was not the question involved in that case. This was only a way of saying that any state taxing-statute might impair the Federal power. It was a mere phrase, used argumentatively and not to *support* a Federal statute, but to *annul* a state statute. In

Veazie Bank v. *Fenno*, 8 Wall. 533

the question arose during the Civil War, whether Congress could impose a 10 per cent tax on the notes of a State bank, and that statute was upheld upon the ground that it was the proper exercise of the power of Congress to provide a circulation of coin and to authorize the emission of letters of credit, although it was also stated—in answer to the argument that the tax was so excessive as to indicate the purpose of Congress to destroy the bank's franchise—that the court could not pronounce the law unconstitutional for the reason "that the tax was excessive."

With this as a basis, this phrase of Chief Justice Marshall—that the power to tax involves the power to destroy—has now become in the minds of many in and out of Congress a fixed legal maxim, *by which the powers of Congress are to be measured.* Congress now treats it as fully warranting the use of the taxing power to regulate or prohibit whatever it may not otherwise regulate or prohibit.

Indeed, this court having very recently adjudged that Congress had exceeded its commerce power in directly prohibiting child labor, Congress has now endeavored to accomplish the same result under the form of a tax law.

> "Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised at all it must be exercised at the will of those in whose hands it is placed." (*Brown* v. *Maryland*, 12 Wheat. 439.)

If, therefore, Congress is to be given by this court a free hand in enacting such statutes, the right of the states to regulate their internal affairs will henceforth depend entirely on the will of Congress. It may prescribe the kind of fire escapes to be used on hotels and theatres, by taxing such as do not adopt its kind of fire escape. It may regulate the height of city buildings by imposing a pro-

hibitive tax on owners of buildings exceeding its prescribed height. It may deprive owners of grain within a state of the power to insure it by imposing a prohibitive tax on future contracts, through which alone they may thus insure; it may prohibit, or regulate in a drastic manner through the subordinates of a cabinet officer—for cabinet members cannot in person give such service—every commercial exchange or other business in no way engaged in interstate commerce; and in innumerable other ways Congress may nullify the powers expressly reserved to the states by the 10th Amendment to the Constitution.

But Congress has not always thought that the power to tax implied the power to regulate or destroy.

In 1892 a bill passed one House of Congress, commonly known as the "Hatch Anti-Option Bill," which—like the present Act—excepted from its provisions contracts for future delivery of grain when made by farmers. It imposed a tax of 20c a bushel on all other contracts for the future delivery of grain, required every person engaged in the business of making such contracts to take out a license, and required that the terms of all such contracts should be in writing, and be recorded in books. The purpose was, by the size of the tax, to suppress all future trading. But it was defeated in the Senate, largely by the arguments against its constitutionality. One of these was by Senator (afterwards Chief Justice) White, who argued that the bill was "flagrantly unconstitutional legislation." We quote from his speech as follows (Congressional Record, Vol. XXXIII, 6513, 6515, 6516, 6517):

> "This, then, is a bill licensing the Federal government to step over the State line and destroy any contract made within a State between citizens of a State which the Federal government may choose to destroy. * * * If the theory which this bill propounds is true every vestige of State autonomy has been wiped

off, and today instead of having a government of limited and restricted powers, each government moving by the force of constitutional gravity in its own orbit, we stand the most unlimited and arbitrary government on the face of God's earth. * * * Ah, but I am told that this is a taxing law; that it is an exercise of the taxing power. It is a tax that does not tax. I call attention to this distinction. On the very face of the bill not even a pretext of taxation can be found. By the very terms of the bill no tax can result from its provisions. * * *

"Ah, but it is said this is an exercise of the taxing power, and although it is an exercise of the taxing power which does not tax to produce revenue, we will declare in this bill that we propose to tax for revenue, although we do not propose to so do. If we do violate the Constitution in doing this, when it goes to the court of last resort it will not be able to decipher the false purpose of the bill and will therefore hold the bill not to be unconstitutional. Why will the court hold it not to be unconstitutional? Not because it is not unconstitutional, but because we have breathed into this law a living lie, because we will have declared that our purpose is to tax for revenue, when every line and letter of the bill says the bill is not an exercise of the taxing power at all, but an attempt to destroy the very framework of the Constitution by going into the States and doing that which the Federal Government confessedly has no power to do. * * *

"It is perfectly true that in two or three cases the Supreme Court of the United States have said that where on the face of a statute there was the exercise of taxation, as the statute on its face was a taxing statute, the court would not destroy the face of the statute by wiping out the taxing provision in the statute with the sponge of the motives which may have actuated the members who passed it. Is that the case here? Where the face of the statute shows no tax, where the face of the statute itself eliminates all human possibility of the exercise of the taxing power for revenue, then I say the mission of jurisdiction is given to the courts of this land to brush that statute away for its flagrant and open violation of the Constitution. Is this not necessarily true?"

And after pointing out the distinction between imposts and the power to lay down internal taxes, the Senator said:

> "In other words, I contend that where power to destroy exists the use of a wrong instrumentality to do the destruction, may be the abuse of an instrumentality but not an abuse of power, because the power to destroy is vested. But where the power to destroy does not exist, the use of an instrumentality to destroy that which there is no power to destroy is not alone an abuse of the instrumentality, but an usurpation of the power itself. Now, the usurpation of power by Congress not vested by the Constitution in Congress is unconstitutional. This being true, it follows that if the usurpation is clear on the face of the act, if the act itself shows the usurpation, the power exists in the Supreme Court of the United States to prevent the usurpation."

This court has not yet assented to this theory that the taxing power of Congress is unlimited. It has, indeed, held that, where a statute is on its face purely and exclusively a taxing law and the only thing relied on to support the charge that it is a subterfuge or roundabout way of doing something else is the amount of the tax, this court will not question the motive of Congress.

McCray v. *United States*, 195 U. S. 27.

But this court was not yet decided that where, as here, the law does not profess to be solely a taxing measure, but by its title and its terms is also a law regulating something which it is beyond the power of Congress to regulate, the statute must be sustained under the taxing power. To so hold would be to shut one's eyes to the real purpose of the law, when Congress had disclosed that motive and purpose in the terms of the statute.

Indeed, its decisions (already referred to) seem to require this court to deduce from the STATUTE the purpose of Congress, and to annul the law where that purpose is not consistent with the Constitution.

It is here too plain for argument that the *only* real purpose of the Future Trading Act is to regulate the grain exchanges. This is shown, not only by the prohibitive character of the tax, but by all the other provisions of the Act. The power to tax is exercised only, as shown later, to provide a *penalty* for non-compliance with statutory requirements which Congress has no power to impose.

Hence the *tax* of 20 cents a bushel imposed by Section 4 of the Act should be annulled because beyond the taxing power of Congress.

But appellants' contention goes still further. It is that, even if this tax itself be upheld, the regulatory features of the Act should be adjudged void because not within the taxing power of Congress. And for this there seems to be ample warrant in the decisions of this court.

Thus Congress has no right, under its taxing power, to prohibit or create a trade in a state in order to increase its objects of taxation.

United States v. *DeWitt*, 9 Wall. 42.

There Congress, having the power to tax all oils, preferred to tax only certain oils, and in order to increase the quantities of oils of the kind it taxed, it prohibited in the taxing statute the use of certain mixed oils which it did not tax; and this court, in annulling this prohibitive feature of the Act, said:

> "Has Congress power, under the Constitution, to prohibit trade within the limits of a State? * * * But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. * * *

If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."

License Tax Cases, 5 Wall. 462,

where in discussing the power of Congress to tax, this court said, "But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it."

The Future Trading Act merely creates "contract markets" in order that Congress may—*not* tax—but regulate, future trading thereon.

U. S. v. *Doremus*, 249 U. S. 86-93,

which involved an Act of Congress—the so-called Harrison Narcotic Drug Act. This Act purported to be based on the power of Congress to levy taxes. The District Court held a certain section of the Act unconstitutional for the reason that it was not a revenue measure, but was an invasion of the police power reserved to the states This court said (p. 93) (italics ours):

"Of course, Congress may not in the exercise of Federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the courts to inquire into that subject. *If the legislation enacted has some reasonable relation to the exercise*

of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."

And a bare majority of the court upheld the section in question, because in their opinion it did "tend to keep the traffic above board and subject to inspection by those authorized to collect the revenue," and they could not agree to the contention that the section in question "can have nothing to do with facilitating the collection of revenue;" while the minority of the court, putting a different construction on the section, held it a mere attempt to invade the police power of the States.

Thus in this recent case this court was unanimous in holding that every provision of the taxing law must have some reasonable relation to the exercise of the taxing authority conferred on Congress, and must tend to facilitate the collection of the revenue. Its members disagreed only as to the application of that principle to the terms of that statute.

That decision alone would seem to require that these regulatory features of The Future Trading Act be held unconstitutional.

Now to apply the foregoing to the case at bar—does any of the regulatory provisions of the Future Trading Act summarized on pp. 31-33 of this brief have any reasonable relation to the tax imposed by that Act? Do they tend to aid in the ascertainment and collection of taxes? Is there any proper relation between these regulations treated as a means, and the end—the collection of the tax? Do they have any adaptiveness or appropriateness to a law which imposes a tax upon future trading by others than members of an exchange? Is the end sought "legitimate," and do these provisions "consist with the letter and spirit of the Constitution"?

None of these regulating provisions relate to persons or transactions subject to the tax imposed by the Act. They apply only to an exchange, which becomes a contract market, and such an exchange and all future contracts of its members are free from the tax.

How can forcing representatives of farmers' organizations into membership in the exchange aid in ascertaining or collecting the tax imposed? The contracts of these associations are expressly exempted from the tax.

In what way does the provision of the Act which breaks down the commission rule of the exchange in favor of farmers' organizations contribute to the collection of the tax? The present commission rule, as modified by the Act, will relate only to transactions which are exempt from this tax.

What possible relation to the collection of the tax have those provisions, which require members of a "contract market" to make such memoranda, and the exchange to make or cause its members to make, such reports and records of their transactions, as the Secretary of Agriculture may prescribe, and expose those memoranda, reports and records to the inspection of the Department of Agriculture? They relate exclusively to transactions which are not taxed, and will in no way aid the Government in discovering transactions which are taxed. As soon as the revenue officers learn that any person is a member of an exchange which has been made a contract market—which he may ascertain by reference to the published membership roll of the exchange—they know that all his transactions, whether made for his own account or as agent for others, are free from the tax. A provision requiring members of an exchange—which had *not* become a "contract market"—to keep records of their transactions might be proper, because thereby revenue officials might ascertain whether any of those trans-

actions were sales for future delivery of grain. But the provisions now under consideration can have no such purpose, and contribute to no such result.

How can the provisions of this Act requiring the exchange to prevent the dissemination of false reports concerning crops, or the manipulation of prices, or the cornering of grain aid in any way the collection of this tax? Such reports, or manipulation, or cornering, might temporarily operate to increase or decrease the number of contracts for future delivery on the "contract market," but as these are untaxed, such reports would not have the slightest effect upon the revenue to be derived from the tax. Even if its purpose or effect were to increase such revenue it would be unconstitutional. *United States* v. *DeWitt, supra.*

What relation to the collection of the tax has the provision of the Act requiring the exchange to enforce any order the Secretary of Agriculture may see fit to make depriving any person of trading privileges? All the transactions which a member of an exchange will thus be prevented from making are in the untaxed class.

Surely Congress has no power to penalize a person, who may have evaded a tax, by depriving him of the privilege of trading on an exchange. Much less may it do so when such person is a member of a "contract market" and is not evading any tax. It may only enforce a taxing statute by providing therein the usual money penalties and punishment.

How is the collection of the tax aided by the provision which enables the Secretary of Agriculture to invade the privacy of the offices of the exchange and its members (when the exchange is a "contract market") for the purpose of ascertaining the facts regarding the operation of boards of trade with a view to publishing the results

of such investigation? Surely such investigations as a taxing law may authorize must be confined to investigations which may lead to the discovery of taxable transactions. They can not cover the transactions of an exchange or its members which are not taxed.

On the face of this Act its purpose is two-fold. (1) It imposes a prohibitive tax on certain transactions. Its purpose was not to tax contracts for future delivery when made by or through a member of an exchange, like this Board, which is "located at a terminal market upon which cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service." This was emphasized by the petition of the Secretary of Agriculture to set aside the temporary restraining order of this court.

(2) Its main purpose is to place all boards of trade under the control of the Secretary of Agriculture, and to open their doors to co-operative associations of farmers under circumstances that would permit them to market their crops on the exchange at cost. So dominant is this purpose that the title of the Act should be read as "An Act taxing contracts for the sale of grain for future delivery, and options for such contracts, *for the purpose of* regulating boards of trade."

If the commerce power of Congress were unlimited, Congress would have incorporated these provisions into a purely regulating statute; and as every statute, to be effective, must contain some provision which will compel obedience to it, such act would have made boards of trade subject to the usual penalties or punishment for non-compliance therewith.

But the commerce power of Congress does not extend to any of the regulating features of this Act. Hence

Congress conceived the novel idea of compelling exchanges to comply with the Act by making *members* of a non-complying exchange subject to a prohibitive tax on their future trading. Thus is presented the first attempt of Congress to escape the limitations imposed by the Constitution by using its taxing power *to provide a penalty*, with which to compel compliance with a statute Congress has no power to pass.

There is here no pretense of raising revenue. A prohibitive tax is laid, which is to operate as a penalty to compel compliance with an unconstitutional law. Could one conceive a plainer "roundabout way" to escape the limitations of the Constitution? Could one devise any more obvious *pretext* for evading its provisions?

In the present Act the misuse of the taxing power is most glaring; for it does not impose a penalty upon boards of trade (whose compliance with the Act is sought) by exempting them from a tax otherwise imposed upon them? It offers to *members* of an exchange exemption from a prohibitive tax in order to force these members to compel compliance by their exchange with these regulatory enactments.

Have we not here reached the limit of subterfuge? How can the citizens of this Republic be expected to respect the Constitution, if such transparent evasions as this receive the sanction of this court?

A recurrence to another principle may be here appropriate. In

Boyd v. *United States*, 116 U. S. 635,
Monongahela Navigation Co. v. *United States*, 148 U. S. 325,

in annulling certain acts of Congress, this court said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in

that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

It is therefore submitted that neither the tax imposed upon future contracts nor these regulating features of this Act can be sustained under the taxing power of Congress.

V.

THE "PUT" AND "CALL" PROVISION.

If Section 3, which imposes a prohibitive tax on "puts" and "calls," were in a statute which professed on its face to be exclusively a taxing statute, the decisions of this court would preclude an attack upon its validity.

But such is not the case here. This statute professes to regulate the transactions of members of an exchange as well as to tax. All the other provisions of the Act are clearly regulatory, and this tax is prohibitive, being more than double the present price of some kinds of grain taxed.

Furthermore, these "puts" and "calls" are clearly intrastate transactions only. (Rec., 8.) The State of Illinois has already legislated respecting them in the following provision (Revised Statutes of Illinois, Chap. 38, Sec. 130):

> "Whoever contracts to have or give to himself, or another, the option to sell or buy at a future time any

grain or other commodity * * * where it is, at the time of making such contract, intended by both parties thereto that the option, whenever exercised, or the contract resulting therefrom, shall be settled, not by receipt or delivery of said property, but by the payment only of difference in prices thereof, or whoever forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than $10 or more than $1,000, or confined in the county jail not exceeding one year, or both."

Do not the foregoing considerations make inapplicable to Section 3 the decisions of this court that an improper motive of Congress will not be inferred from the size of the tax alone; and do they not warrant a decision that Section 3, as well as the others, must be regarded as regulatory in character and beyond the power of Congress?

In other words, should not all the provisions of this Act be adjudged unconstitutional?

Respectfully submitted,

HENRY S. ROBBINS,
Counsel for Appellants.

APPENDIX.

AN ACT

TAXING CONTRACTS FOR THE SALE OF GRAIN FOR FUTURE DELIVERY, AND OPTIONS FOR SUCH CONTRACTS, AND PROVIDING FOR THE REGULATION OF BOARDS OF TRADE, AND FOR OTHER PURPOSES.

This act shall be known by the short title of "The Future Trading Act."

Sec. 2. That for the purposes of this act "contract of sale" shall be held to include sales, agreements of sale and agreements to sell. That the word "person" shall be construed to import the plural or singular and shall include individuals, associations, partnerships, corporations and trusts. That the word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax, and sorghum. The term "future delivery," as used herein, shall not include any sale of cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

Sec. 3. That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents

per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each and every privilege or option for a contract either of purchase or sale of grain, intending hereby to tax only the transactions known to the trade as "privileges," "bids," "offers," "puts and calls," "indemnities,' or "ups and downs."

Sec. 4. That in addition to the taxes now imposed by law there is hereby levied a tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery except—

(a) Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is grower thereof, or in case either party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners or growers of grain, or of such owners or renters of land; or

(b) Where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided, and if such contract is evidenced by a memorandum in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery, and provided that each board member shall keep such memorandum for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice.

Sec. 5. That the Secretary of Agriculture is hereby authorized and directed to designate boards of trade as

"contract markets" when, and only when, such boards of trade comply with the following conditions and requirements:

(a) When located at a terminal market upon which cash grain is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service.

(b) When the governing board thereof provides for the making and filing, by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consumed at, on, or in a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated at, on, or in a board of trade, such record to be in permanent form, showing the parties to all such transactions, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof prevents the dissemination, by the board or any member thereof, of false, misleading, or inaccurate report, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

(d) When the governing board thereof provides for the prevention of manipulation of prices, or the cornering of any grain, by the dealers or operators upon such board.

(e) When the governing board thereof admits to membership thereof and all privileges thereon on such boards of trade any duly authorized representative of any lawfully formed and conducted co-operative associations of producers having adequate financial responsibility: *Provided*, That no rule of a contract market against rebating commissions shall apply to the distribution of earnings among the bona fide members of any such co-operative association.

(f) When the governing board shall provide for making effective the final orders or decisions entered pursuant to the provisions of paragraph (b) section 6 of this act.

Sec. 6. That any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

(a) A commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney-General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with the above requirements or is not enforcing its rules of gov-

ernment made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided,* That such suspension or revocation shall be final and conclusive unless within 15 days after such suspension or revocation by the said commission such board of trade appeals to the Circuit Court of Appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such a board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the Circuit Court of Appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the Circuit Court of Appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such

board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided further,* That if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described therein, consisting of the Secretary of Agriculture, the Secretary of Commerce and the Attorney-General of the United States, with the right to appeal as provided for in other cases in this section, the decision on such appeal to be final and binding on all parties interested.

(b) That if the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the said commission refuse all trading privileges thereon to such person. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the said commission, or before a referee designated by the Secretary of Agriculture, who shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture as chairman of the said commission. That for the purpose of securing effective enforcement of the provisions of this act the provisions, including penalties, of section 12 of the interstate commerce act, as amended, relating to the attendance and

testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, or said referee in proceedings under this act, and to persons subject to its provisions. Upon evidence received the said commission may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in said order. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States Circuit Court of Appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its chairman, or to any member thereof, and thereupon the commission shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the commission, and the findings of the commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. In proceedings under paragraphs (a) and (b) the judgment and decree of the court shall be final except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

Sec. 7. That the tax provided for herein shall be paid by the seller, and such tax shall be collected either by the affixing of stamps or by such other method as may have

been prescribed by the Secretary of the Treasury by regulations, and such regulations shall be published at such times and in such manner as shall be determined by the Secretary of the Treasury.

Sec. 8. That any board of trade that has been designated a contract market, in the manner herein provided, may have such designation vacated and set aside by giving notice in writing to the Secretary of Agriculture requesting that its designation as a contract market be vacated, which notice shall be served at least 90 days prior to the date named therein, as the date when the vacation of designation shall take effect. Upon receipt of such notice the Secretary of Agriculture shall forthwith order the vacation of the designation of such board of trade as a contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and his order to all other contract markets. From and after the date upon which the vacation became effective, the said board of trade can thereafter be designated again a contract market by making application to the Secretary of Agriculture in the manner herein provided for an original application.

Sec. 9. That the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade and may publish from time to time, in his discretion, the result of such investigation, and such statistical information gathered therefrom, as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person, and trade secrets or names of customers: *Provided*, That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary, relative to the conduct of any board of trade, or of the transactions of any per-

son found guilty of violating the provisions of this act under the proceedings prescribed in section 6 of this act: *Provided further,* That the Secretary of Agriculture in any report may include the facts as to any actual transaction. The Secretaryof Agriculture, upon his own initiative or in co-operation with existing governmental agencies, shall investigate marketing conditions of grain and grain products, and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such methods as he may deem most effective, information respecting the grain markets, together with information on supply, demand, prices, and other conditions, in this and other countries that affect the markets.

Sec. 10. That any person who shall fail to evidence any such contract by a memorandum in writing, or to keep the record, or make a report, or who shall fail to pay the tax, as provided in sections 4 and 5 hereof, or who shall fail to pay the tax required in section 3 hereof, shall pay in addition to the tax a penalty equal to 50 per cent of the tax levied against him under this act and shall be guilty of a misdemeanor, and upon conviction thereof be fined not more than $10,000 or imprisonment for not more than one year, or both, together with the costs of prosecution.

Sec. 11. That if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Sec. 12. That no tax shall be imposed by this act within four months after its passage, and no fine, imprisonment

or other penalty shall be enforced for any violation of this act occurring within four months after its passage.

Sec. 13. The Secretary of Agriculture may co-operate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employes, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this act in the District of Columbia and elsewhere, and there is hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.

Approved August 24, 1921.

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No. 616.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AMEND AN ORDER ENTERED NOVEMBER 21, 1921.

HENRY S. ROBBINS,
Counsel for Appellants.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States

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JOHN HILL, Jr., et al.,
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HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' SUGGESTIONS IN SUPPORT OF THEIR MOTION TO AMEND THE ORDER ENTERED NOVEMBER 21, 1921.

The remaining part of this order as entered is as follows:

> "It is ordered, the appellees not objecting, That the Board of Trade of the City of Chicago and its directors, appellees, are restrained from seeking or accepting from the Secretary of Agriculture a designation of said Board of Trade as a 'contract market' under the Act of Congress approved August 24, 1921, entitled 'The Future Trading Act,' or from admitting to membership in said Board any representative of any co-operative association of producers as required by said Act; or from modifying its rules or by-laws, as required by said Future Trading Act, in order to entitle said Board of Trade to be designated as a 'contract market;' and from otherwise complying with the terms of said Act prior to the final judgment of the court herein."

The purpose of the original motion was to preserve the *status quo* until the decision of this court upon the validity of The Future Trading Act. In granting the motion this court recognized its power to preserve this status. Such power belongs to every appellate tribunal. (See appellants' brief on the original motion.) It includes the power to make *any* order necessary to preserve, until the final decision, the condition existing when the order is made.

The order, if amended as here asked, will do this. *The present order does not.* At the present time every member of the Board of Trade may sell grain for future delivery without paying any tax thereon. If the present order is not amended, these members after December 24, 1921—when The Future Trading Act goes into effect—must either stop making any sales for future delivery or subject themselves to a tax of 20 cents a bushel on such sales, or to the heavy penalties of the Act, during the pendency of this appeal, if the Act shall be adjudged valid. In either event, the existing status does not continue until the final decision of this court. The right to continue making sales for future delivery free from any contingent liability does not continue during the pendency of the appeal. The order as now entered only restrains the Secretary of Agriculture and the other officials from collecting from appellants *during the pendency of this appeal* and 20 days after final judgment herein, any tax or penalty accruing under such Act.

As the order now stands, the Board of Trade is restrained from becoming a "contract market" which to that extent properly preserves the present status. But in doing this the order disturbs the status as to members of this exchange, who must either cease trading or continue trading under a contingent liability for extremely heavy taxes and penalties. The only safe course

for these members to adopt will be to cease all future trading on this important exchange, and this doubtless will result in a great disturbance of the grain trade of the country.

The Future Trading Act does not contemplate making members of the principal exchanges pay any tax upon their sales for future delivery. But for the order of this court restraining the Board from becoming a "contract market" it would become a "contract market" and then no member of this Board could become liable for any tax imposed by the Act. Hence the amendment proposed will not deprive the Government of any revenue.

Indeed, the restraining order which the amendment seeks against the collection of any tax or penalty accruing while the case is before this court, is a mere incident, and a necessary incident, to the order entered by this court restraining this Board from yielding to the compulsion of this statute before its constitutionality has been passed upon by this court.

The only effect of the order, if amended, would be to provide effectively that this Future Trading Act shall not become operative as against members of the Chicago Board of Trade until this court has decided upon its constitutionality.

HENRY S. ROBBINS,
Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION.

To Appellees in the Above Entitled Cause and Their Counsel:

Please take notice that on Monday, the 5th day of December, 1921, at 12 o'clock M., or as soon thereafter as counsel can be heard, we shall present to the court a motion to amend the order entered in the above entitled cause on the 21st day of November, 1921, a copy of

which motion and suggestions in support thereof is herewith served upon you.

HENRY S. ROBBINS,
Counsel for Appellants.

Received a copy of the above notice, motion and suggestions in support thereof, this ..... day of December, 1921.

.....
Counsel for Certain Appellees.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

vs. Appellants,

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AMEND ORDER ENTERED IN THE ABOVE ENTITLED CAUSE ON NOVEMBER 21, 1921.

Now come John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser and Alonzo B. Lord, appellants in the above entitled cause, by Henry S. Robbins, their counsel, and move the court:

To amend the order entered in the above entitled cause on the 21st day of November, 1921, by striking out therefrom the following clause:

"Also, that *during the pendency of said cause in this court and for twenty* (20) *days after final judgment herein,* the appellees, Henry C. Wallace, Secre-

tary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, and each of their successors in office, are restrained from collecting, or attempting to collect, by suit, criminal prosecution or otherwise, from appellants, or any other members of said Board of Trade, any tax or penalty which may have accrued or been incurred under said Future Trading Act, or from taking, during said period, any other steps against said Board of Trade or any of its members to enforce, or compel their compliance with, or punish for non-compliance with, any of the provisions of said Trading Act."

and inserting in lieu thereof:

"Also, the appellees, Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois, and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, and each of their successors in office, are restrained from collecting, or attempting to collect, by suit, criminal prosecution or otherwise, from appellants or any other member of said Board of Trade, any tax or penalty which may have accrued, or been incurred under said Future Trading Act, *during the pendency of said cause in this court and for twenty days after final judgment herein*, or from taking during said period any other steps against said Board of Trade or any of its members to enforce or compel their compliance, or punish for non-compliance, with any of the provisions of said Future Trading Act."

The order is in the terms of the motion therefor, except that the italicized words were transposed. This motion to amend only seeks a change in the location of these words.

The grounds for said motion are stated in the accom-

panying suggestions, which also set out the remaining part of the order as entered.

JOHN HILL, JR., *et al.*,
Appellants.

By HENRY S. ROBBINS,
Their Counsel.

No. 616.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants.

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO ADVANCE AND FOR AN ORDER PRESERVING THE STATUS QUO, AND BRIEF IN SUPPORT THEREOF.

HENRY S. ROBBINS,
Counsel for Appellants.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,
Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

To Appellees in the above entitled Cause and their Counsel:

Please take notice that on the ...15th..... day of November, 1921, at 12 o'clock m., or as soon thereafter as counsel can be heard, we shall present to the court a motion to advance and for an order preserving the *status quo*, a copy of which motion and a brief in support thereof is hereto attached and served upon you.

HENRY S. ROBBINS,
Counsel for Appellants.

Received a copy of the above notice, motion and brief this.....day of November, 1921.

.....
Counsel for Certain Appellees.

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I am authorized by the Solicitor General to say that he concurs in the motion to advance. He also joins me in the suggestion that, if agreeable to the Court, it will suit the convenience of both counsel not to have the case set before the 1st of February.

HENRY S. ROBBINS

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HENRY S. ROBBINS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

JOHN HILL, Jr., et al.,

Appellants,

vs.

HENRY C. WALLACE, Secretary of Agriculture, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO ADVANCE AND FOR AN ORDER PRESERVING THE STATUS QUO.

Now come John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Charles E. Gifford, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, appellants in the above entitled cause, by Henry S. Robbins, their counsel, and move the court:

(1) To advance said cause and set the same down for an early hearing, and

(2) For an order preserving the *status quo* while this cause is pending in this court, by restraining appellees, Board of Trade of the City of Chicago and its directors, from seeking or accepting from said Secretary of Agriculture prior to the final decision of this court a designation of said Board as a "contract market" under The Future Trading Act, or from admitting to membership

in said Board, prior to said decision, any representative of any co-operative association of producers as required by said Act; or from modifying, prior to said decision, its rules or by-laws, as required by said Future Trading Act, in order to entitle said Board of Trade to be designated as a "contract market"; and from otherwise complying with the terms of said Act prior to said decision, and also restraining appellees, Henry C. Wallace, Secretary of Agriculture of the United States; David H. Blair, Commissioner of Internal Revenue of the United States; Charles F. Clyne, United States District Attorney for the Northern District of Illinois; and John C. Cannon, Collector of Internal Revenue for the First District of Illinois, and each of their successors in office, from at any time hereafter collecting or attempting to collect, by suit, criminal prosecution or otherwise, from appellants, or any other member of said Board of Trade, any tax or penalty which may have accrued or been incurred under said Future Trading Act while this cause is pending in this court and for twenty (20) days after its final decision, and also from taking during said period of time last mentioned any other steps against said Board of Trade or any of its members to enforce, or compel their compliance with, or punish for non-compliance with, any of the provisions of said Trading Act.

The reasons for thus preserving the *status quo* are that this would not impose any pecuniary loss upon the Government or prejudicially affect the public, and that in the absence of such order appellants would not fully benefit by a decision of this appeal in their favor.

These reasons are amplified in the brief hereto attached.

JOHN HILL, JR., *et al.*,
Appellants.

By HENRY S. ROBBINS,
Their Counsel.

BRIEF FOR APPELLANTS IN SUPPORT OF THEIR MOTION TO ADVANCE AND FOR AN ORDER MAINTAINING THE STATUS QUO.

This is an appeal from an order dismissing for want of equity a bill filed by appellants in behalf of all the members of the Chicago Board of Trade against that exchange and its directors and also the Secretary of Agriculture, the Commissioner of Internal Revenue, the U. S. District Attorney at Chicago and the Collector of Internal Revenue for that district, to enjoin compliance by said Board of Trade and its directors with the recent Act of Congress entitled, "The Future Trading Act," and the enforcement of that act by the other appellees.

Upon the filing of the bill the District Court entered a rule to show cause why a temporary injunction should not issue and also restraining appellees from complying with or enforcing compliance with said act before the hearing of such application for an injunction.

Some appellees filed motions to dismiss for want of equity and on the return of the rule to show cause the District Court dismissed the bill for want of equity.

The sole purpose of the bill being to have The Future Trading Act declared unconstitutional, the District Court allowed an appeal to this court and directed that the existing temporary restraining order continue in force until this court should act upon appellants' application for a continuance of such order, provided such application should be made by November 21, 1921.

The importance to the public (as well as to the grain exchanges) of an early decision on the validity of this

statute is so apparent that nothing need be said upon that part of the motion, which seeks to have the case advanced. Indeed, we believe that the Government will concur in the request for an early hearing.

We confine ourselves, therefore, to presenting the reasons why the *status quo* should be preserved pending the hearing in this court.

That this court has ample jurisdiction to preserve the *status quo*—as contemplated by this motion—to the end that the parties may have the full and complete relief which they are entitled to receive from this court, is no longer an open question.

> *Omaha St. Rwy. Co.* v. *Interstate Com. Com.*, 222 U. S. 582, and cases cited.

As stated by this court (247 U. S. 220):

> "The present status should be maintained until such time as the court may consider all of the grave questions of laws * * * connected with this complicated and important litigation."

This Act is entitled, "An Act taxing contracts for the sale of grain for future delivery and options for such contracts and providing for the regulation of Boards of Trade, and for other purposes."

Thus the purpose of the Act is two-fold:

First. To impose a tax of 20 cents a bushel on the following transactions:

> (a) Uni-lateral contracts for grain, commonly known as "puts and calls." (Sec. 4.)
>
> (*b*) All contracts for future delivery of grain *not* made—
>
> 1—either by the present owner or grower of grain, or associations of such owners or growers;
>
> 2—or by or through a member of one of the principal grain exchanges—that is, exchanges having recognized official weighing and inspection service, and

upon which cash grain is sold in sufficient volume to reflect the general value of grain. Such exchanges are to be designated as "contract markets" by the Secretary of Agriculture. (See sub-clause (a) of Section 5 of the Act.)

Second. The other purpose is to regulate these designated grain exchanges and their members in the following respects:

(1) The special charter granted by the State of Illinois to the Chicago Board of Trade confers on it the power to admit such members "as it may see fit" and the Illinois courts refuse to interfere with the exercise of this power. Sub-clause (E) of Section 5 of the Future Trading Act *compels* this exchange (and others) to admit to membership any duly authorized representative of any co-operative association of producers.

(2) Again, the charter of this Board authorizes it to make such rules and by-laws for the management of the business of its members "as it may think proper," and under this power the Board has for many years maintained a rule requiring its members to charge their principals certain minimum rates of commission; and the Illinois courts hold such rule to be valid. The Future Trading Act breaks down this rule, as to farmers' co-operative associations, by requiring exchanges to sanction so-called "patronage dividends," whereby the representative of a farmers' co-operative organization admitted to membership may rebate all commissions earned by him at the regular rates back to the members of the co-operative association on the basis of the quantity of grain sold by each member through such representative, thus enabling these organizations to transact business on the exchanges at *cost*. The result of this will be to much impair, if not ultimately to destroy—the value of memberships in this exchange, which are now worth about $7,000.

(3) The Act also requires every member of an exchange making contracts for future delivery to evidence such trades by detailed memoranda in writing, and to preserve these memoranda for three

years or longer, if the Secretary of Agriculture so directs.

(4) The Act also requires each exchange to provide for making and filing, either by the Board or its members of *reports,* in the form to be prescribed by the Secretary of Agriculture, showing the details of all transactions entered into and also for the keeping of *records* showing the details of all such transactions in a manner to be prescribed by the Secretary of Agriculture and for the period of three years.

(5) The Act also authorizes the Secretary of Agriculture to deprive any member of an exchange, or other person, of the right to make contracts for future delivery if he shall violate the terms of the Act, and also requires the exchange to deny to any member or other person the privilege of trading on the exchange during the time he shall be deprived of that privilege by the Secretary of Agriculture.

A fine of not more than $10,000, or imprisonment for not more than one year, or both, is the punishment prescribed for any person violating the provisions of the Act; but this does not apply to the boards of trade.

Compliance with the Act by the boards of trade is enforced by providing that the members of such exchanges as shall be designated as "contract markets" shall be exempt from the tax, and the Secretary of Agriculture is directed to recognize as "contract markets" only such exchanges as comply, and continue to comply, with the provisions of the Act.

The Act was approved August 24, 1921, but it provides that no tax shall be imposed and no penalty be enforced for any violation of the Act, *occurring within four months after its passage.* Thus by the terms of the Act it becomes operative on the 24th of December, 1921.

I.

Contracts for future delivery of grain must, by the rules of the Board of Trade, be made—and they are in fact made—only in its exchange room between certain

market hours, and only between members of the Board there present.

More than three-quarters of those contracts are settled by offsetting other like counter-contracts made between members in the exchange room, and the balance of said contracts are performed by actual delivery; but this delivery in all cases is required by the rules of the Board to be, and is, by the delivery of warehouse receipts issued by the grain-mixing public warehouses of Chicago, which under a statute of Illinois are required to mix immediately all grain tendered for storage with other grain already in store of like grade, and to state on their receipts the fact that the grain covered by the receipt is so mixed; and when the receipts are tendered to obtain the grain this statute also requires the warehouseman to deliver such of the grain in his warehouse of the grade called for by the receipt, *as has been longest in store.*

Thus all grain coming to Chicago from other states and going into elevators at once loses its identity, and becomes an unidentified part of the common mass of the property in the state.

All these contracts for future delivery contemplate only the delivery of warehouse receipts, upon which holders will get only the required number of bushels of the proper grade out of a common mass of grain in the elevator, the component parts of which, if from other states, have completely lost their interstate character. (See Record pp. .....)

That this future trading is in no sense interstate commerce seems to have been settled by this court in

Ware & Leland v. *The Mobile Co.*, 209 U. S. 405.

That case involved future contracts made upon the New York Cotton Exchange for the delivery of bales of cotton, which continued to preserve their identity. The

present case becomes still stronger because shipments of grain from other states *do* lose their identity when stored in the Chicago elevators.

II.

Nor can the provisions of The Future Trading Act above referred to, which compel the exchanges to admit to membership representatives of farmers' co-operative associations, which break down the commission rule of this exchange, and require the exchanges and their members to make and preserve memoranda, reports and records of their transactions, be sustained under the taxing power of Congress.

This court has held that provisions claimed to be in the exercise of the taxing power must have some reasonable—and not merely remote—relation to the exercise of the taxing authority conferred by the Constitution.

U. S. v. *Doremus*, 249 U. S. 86, 93.
U. S. v. *DeWitt*, 9 Wall. 41-44.

None of these foregoing provisions relate to persons or transactions subject to the tax imposed by the Act. Both the exchange and all the future contracts of its members are exempt from the tax. How then can forcing unacceptable persons into membership in the exchange, or breaking down the commission rule of the exchange, or compelling the exchange or its members to make or keep memoranda, reports or records of transactions not taxed, contribute in the slightest degree to the imposition, ascertainment or collection of a tax on contracts of persons, who are not members of the exchange?

Thus it seems that these provisions of The Future Trading Act, so far as they concern the Chicago Board

of Trade and its members, can be sustained neither under the taxing, nor the commerce, power of Congress.

Nor does R. S., Section 3224—which prohibits suits to enjoin the collection of taxes—have any application here. That section is not of universal application; it has its exceptions.

Pacific Whaling Co. v. *U. S.*, 187 U. S. 449-452.
Dodge v. *Osgood*, 240 U. S. 118, 122.

Section 3224 is to be considered with reference to the purpose of its enactment. This was to avoid having the revenue of the Government tied up by injunction suits, another remedy being provided by statute through a suit by the taxpayer to recover after he has paid his tax under protest. But appellants can not test the constitutionality of this Future Trading Act by paying the tax under protest and then suing to recover; for, unless restrained, the Board of Trade, under the compulsion of this Future Trading Act, will accept designation as a "contract market," and as soon as it does so, the contracts for future delivery of these appellants will be exempt from the tax imposed by the Act. They could not then pay, because the Collector of Internal Revenue would not accept from them any tax; nor could they claim to have paid under protest, if they paid a tax not exacted from them.

Again, the purpose of Section 3224 is to prevent the withholding of the tax when due and the consequent embarrassment to the Government from a delayed revenue. But the Government will never get one dollar from this 20 cents per bushel tax imposed upon future trading. With wheat now selling in the market at $1.00 a bushel and corn at 46c a bushel and oats at 31c a bushel (Rec., ...), no person can afford to make, and pay the tax upon, a single contract for future delivery of grain. The tax is,

and is intended to be, a prohibitive one, and will never produce one dollar of revenue; hence the reason for Section 3224 here fails. The other statutory remedy is not available to these appellants, and they have no remedy except by bill and injunction.

The purpose of Section 3224 would not be defeated by enjoining these officials from collecting any tax or penalty under this Act from the members of this Board of Trade until the constitutionality of this Act shall be determined.

Indeed, the injunction against the collection of any tax or penalty or punishment while the case is before this court is a mere incident, and a necessary incident, to an order restraining this Board of Trade from yielding to the compulsion of this statute before its constitutionality has been passed upon by this court.

Indeed, no order should be entered restraining the Board of Trade from becoming a "contract market," unless the court shall also restrain these officials, and their successors, from collecting from any member of this Board of Trade any tax or penalty, or proceeding criminally against any such member for any act or omission, *which shall accrue or be incurred during the pendency of this appeal in this court and at least twenty days thereafter*, this twenty days being necessary to afford time to this exchange to qualify as a contract market, should the decision of this court uphold the statute.

For if without this clause the Board of Trade shall be enjoined from becoming a "contract market," every member of the Board making a contract for future delivery while this case is pending in this court would be confronted with the alternative of either becoming contingently liable to pay these prohibitive taxes, or of not making any contracts for future delivery at all, during

the pendency of this appeal—and the latter would be the only safe course for all members of this exchange to adopt—with the result that all future trading on this exchange—the largest grain market in the world—would be temporarily abandoned, and the grain trade of the country would be thrown into great confusion, followed doubtless by many business failures.

Indeed, the only effect of such an order would be to provide that this Future Trading Act shall not become operative, as against the members of the Chicago Board of Trade, until this court shall have decided upon its constitutionality.

That the public will not suffer by this short suspension of the Act, as respects this one exchange, is evidenced from the fact that this exchange and its future trading have been existent for more than seventy years without the necessity of any congressional regulation, and Congress, itself, postponed the operation of the present Act for four months after its passage.

It is therefore respectfully submitted that the *status quo* should be preserved by a restraining order in the terms specified in the motion here submitted.

HENRY S. ROBBINS,
Counsel for Appellants.